RNI No. MAHBIL /2009/31744
Reg. No. MH/MR/South-318/2013-15

महाराष्ट्र शासन राजपत्र

भाग एक–ल

वर्ष ६, अंक २६] गुरुवार ते बुधवार, सप्टेंबर ११-१७, २०१४/भाद्र २०-२६, शके १९३६ [पृष्ठे ४०, किंमत : रुपये २३.००

प्राधिकृत प्रकाशन

(केंद्रीय) औद्योगिक विवाद अधिनियम व मुंबई औद्योगिक संबंध अधिनियम यांखालील
(भाग एक, चार-अ, चार-ब आणि चार-क यांमध्ये प्रसिद्ध केलेल्या अधिसूचना, आदेश व निवाडे यांव्यतिरिक्त)
अधिसूचना, आदेश व निवाडे.

IN THE INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

BEFORE SHRI P. R. CHAVARE, PRESINDENT

COMPLAINT (ULP) No. 1180 OF 1999.—Shri Durgaprasad Chauhan, C/o.—Arun Kumar Dube, Shop No. 2, Gul Mohd. Chawl, Cross Road, Dharavi, Mumbai 400 017.—*Complainant*—V/s.—M/s. Singer India Ltd., 10 II, Kailash Building, Bandra (West), Mumbai, (2) Shri Vinod Sharma, Regional Manager, Singer India Ltd., 10 II, Kailash Building, Bandra (West), Mumbai.—*Respondents*.

CORAM.—Shri P. K. Chavare, President.

Appearances.—Shri B. V. Rao, Advocate for Complainant.

Shri A. Mathew, Advocate for the Respondents.

Order

1. The Complainant has alleged that the Respondent has angaged in unfair labour practices within the meaning of items 3, 5, 6, 9 and 10 of Schedule IV of the MRTU and PULP Act, 1971 on and from 31st March 1994 and continuously thereafter till today.

2. The facts which are not seriously in dispute are that the Respondent company engaged in manufacturing and selling the sewing machines and home appliances which has got some 140 establishments all over the world. The Respondent No. 2 is the Regional Manager and incharge of the day to activites of the Respondent No. 1 company.

3. The Respondent No. 2 sells the sewing machines manufactured by Respondent No. 1 and also the home appliances through various showrooms and other Sales services extended to dealers and customers.

4. It has a zonal office at Bandra which employs six workmen.

5. It is claimed by the Complainant that he came to be employed on 2nd February 1994. Initially, he was appointed as a Trainee and his services were confirmed with effect from 1st August 1994 *vide* letter dated 26th July 1994. It is the case of the Complainant that looking to the nature of work, he is a skilled workman. According to him, he was paid (1) no salary, (2)

he was not paid cnoveyance allowance, (3) he was not paid Travelling Allowance even though the said allowances were paid to other employees from time to time. Thus, it was alleged that the Complainant was treated partially and this according to the Complainant, is an unfair labour practice within the meaning of item 5 of Schedule IV of the MRTU and PULP Act, 1971.

6. It is further alleged by the Complainant that he was transferred from unit to unit and he was never allowed to settle down in one place.

7. The Complaint also reveals that the Complainant was raguired to visit 5/6 customers a day located at various places and for doing so, he has incurred the expenses and since the conveyance allowance was not paid, he had ventilated his grievances to Shri John and Shri Koli, Area Manager *vide* letter dated 12th May 1998.

8. The Complaint further avare that from time and again the complainant reprsented to the employer that his salary was much less than minimum wages that were fixed by the Government of Maharashtra for the shops and establishment and for skilled cotegory. It is alleged in the camplaint that because time and again he requested the management about his right, he became an eyesour for the management and the management started to harass him on one ground or the other and thus, the Complainant was arbitrarily transferred from Sales and Services unit as per the whims and fancies of the management and in this way, it was claimed by the Complainant that the Respondents have engaged in unfair labour practice under item 3 of Shedule IV of the MRTU and PULP Act, 1971. The Complainant further avers that the Complainant was not sanctioned any E. L., P. L. and was also made to work on paid holidays.

9. The Complainant also alleges that his services were orally terminated by the management. This fact was brought by his Advocate to the notice of the company and then the company took the plea that the Complainant was not reporting for the work.

10. The Complainant further alleges that in the reply which the company has filed before the Conciliation Officer on 27th October 1998, the company has admitted that they would be paid the difference in minimum wages and agreed to take back the Complainant on duty. It is claimed by the Complainant that inspite of this, the Respondent has only paid Rs. 4,987.30 p. claiming that the claim of the Complainant was barred by limitation. Thus, it was claimed that the Respondent was committing and continuing unfair labour practice under item 7 of Schedule IV of the MRTU and PULP Act.

11. It was specifically mantioned in the complaint that he was transferred by letter dated 9th March 1999 to Malad shop under the guise of redesignation. It is claimed by the Complainant that such transfer was entirely *mala fide* and under the guise of following management policy. Thus, it was claimed by the Complainant that it be declared that the Respondents have engaged in unfair labour practice under items 3, 5, 6, 9 and 10 of Schedule IV of the MRTU and PULP Act, 1971. The Respondents be directed to cease and desist from engaging in any aforesaid unfair labour practice and they be directed to pay the wages as per the shops and Establishment Act as per skilled category and pay the difference of wages and allowances to the Complainant which are the arrears from 1994 till date. It was further prayed that the Complainant be given due seniority and the promotion, option on the basis of efficienty. The relief that the Respondent he reatrained from terminating the services of the Complainant, without following due process of law till final disposal of the complaint was also claimed.

12. The affidavit in reply filed by Shri Suresh Chavhan the Law Officer of the Respondent company has been treated as written statement in the matter. All the averments in the complaint were denied. It was specifically stated that the Complainant has failed to specify as to how the Respondents have indulged in unfair labour practices under items 3, 5, 6, 9 and 10 of Schedule IV of the Act. It was denied that the company was indulging in any unfair labour practice all alleged. It was denied that the Complainant was treated partially for no fault of his as alleged. It was claimed that the allegation that the Complainant was not allowed to settle down at one place and was transferred from unit to unit is misconceived. According to the Respondent the

Complainant being as experienced mechanic, his srvices are reguired by the company at various places and, the refore, he was transferred from one place to another on account of administrative exigencies. It was denied that the salary that was paid to the Complainant was much less than minimum wages fixed by the Government of Maharashtra. It was also denied that the Complainant was arbitarily transferred from Sales and Service Unit as per the whims and fancies of the management as alleged. It was claimed that the Complainant remained absent from 6th August 1998 and made false allegations that the management has terminated his services.

13. It was specifically stated that the Complainant was paid difference in minisum wages for the period October, 1997 to December, 1998. It was further claimed that it was not true that the Complainant was transferred to Malad shop under the guise of redesignation as alleged. It was claimed that the allegation that he was not paid his regular dues and allowances is false, baseless and misconceived. It was denied that the Privilage Leave and other leave facilities were allowed to elapse as alleged. It was specifically stated that it was for the Complainant to avail the leave and privilage leave and other leave benefits. On these averments, it was prayed that the complaint be dismissed with costs.

14. The parties went to trial on the following issues :—

Issues..—1. Whethar the Complainant proves that Respondents have committed an unfair labour practices under items 3, 5, 6, 9 and 10 of Schedule IV of the MRTU and PULP Act, 1971 ?

2. What order and reliefs ?

Findings.—(1) Proved to the extent of item 9 only.

(2) As per final order.

Reasons

15. In support of the rival contentions, the oral evidence has been adduced by both the parties. The Complainant himself has deposed at Ex. U-9 and has not examined any other witness. The Respondent company has exemined the Law Officer of the company Shri Suresh Chavan.

16. The Complainant has made a specific statement that he was getting the wages of Rs. 545 per month and on the date of examination *i. e.* on 19th August 2002, he was getting the wages of Rs. 1,500 p. m. The said evidence also disclosed that when he took his grievances to his superior officer without considering, they turned down his application. Thereafter, they started subsequently harassing him and ultimately he filed the present complaint. It is also alleged that the Complainant was not getting the E. S. T. facilities. He also claimed that he was not getting the conveyance allowance. Thus, in the examination-in-chief, the only allegation which the Complainant has made is releting to the payment of minimun wages. The second important allegation which he has made is that he was not getting the E. S. I. facilities. The third allegation which he has made is that he was not getting the conveyance allowance. Thus, in the light of this examination-in-chief, the scope for the Court to decide the issue in dispute will have to be restricted only to these 3 allegations.

17. The witness on behalf of the employer has deposed at Ex. CW-1. He is the Law Officer of the company since 1993. He has distinctly admitted that they are paying currently the minimum wages to all the employees with effect from 2000. He has further admitted that the wages ware not paid as per the Schedule in the period between 1994 and 1998. This admission given by the Law Officer of the company goes to the root of the matter. The Learned Advocate at the time of arguments, admitted that the semi-skilled workman is required to be paid Rs. 1,000 p. m. as minimum wages since December, 1996. It is not in dispute that the Complainant is now being paid Rs. 1,500 p. m. since 2002. From this, it is evident that the employer has not paid minimum wages.

18. To this extent, certainly the provisions contained in item 9 Schedule IV are attracted. Though a specific amount by way of calculation has not been given by the complainant to which he is entitled to it will not be unjust for the Court to direct the employer to calculate the same as per the scales prescribed by the Government in the notification which they have issued in this regard.

19. Coming to the 2 other aspects of the matter *i. e.* the allegation of the Complainant that as an employee, he is not covered under the E. S. I. scheme It is admitted by the Law Officer of the company that all the employees of the company were not covered under the E. S. I. scheme prior to 2000, and now they are so covered. There is no cross-examination of the witness on this count and, therefore, we may take it that the Complainant is covered under the E. S. I. scheme since 2000.

20. It is claimed by the Complainant that he is required to visit the house of 5/6 persons that are located in different are and, therefore, he is entitled to get the conveyance allowance. It appears that the employee cannot be taxed by spending from his pocket for visiting various establishments and the employer will have to reimburee the employee the amount which the employee spend in visiting the various placed of the customers either actual reimburcement or by way of some regular amount by way of conveyance allowance.

21. Thus, barring the aforesaid 3 averments, which the Complainant has made when he entered into the witness box, it can safely be said that the complaint cannot be permitted to travel beyond this evidence for the simple reason that all the allegations have been denied by the eqmployer by filing a specific written statement.

22. In view of the aforesaid reasons, following order is passed :—

Order

(*i*) The Complaint is partly allowed.

(*ii*) It is declared that the Respondent No. 1 has engaged in unfair labour pratice under item 9 of Schedule IV of the MRTU and PULP Act, 1971.

(*iii*) It is directed that the Respondent shall cease and desist from engaging in the said unfair labour practice.

(*iv*) The Respondent is directed to pay the wages of the semi-skilled employee under the shops and Establishments Act and pay the difference of wages and allowances to the Complainant which are in arreers from 1994 onwards.

(*v*) The Respondent No. 1 shall reimburse the Complainant by paying the adequate conveyance allowance which the Complainant might have spent or may continue to spend in visiting the various places of the customers in connection with the repairs of the appliances that are sold through the Agency of the Respondent No. 1 campany.

No order as to costs.

P. K. CHAVARE,
President,
Industrial Court, Maharashtra, Mumbai.

Mumbai,
Dated the 13th June 2003.

S. G. SATHE,
Registrar,
Industrial Court, Mumbai.
Dated the 5th July 2003.

INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

BEFORE SHRI V. P. ROTHE, MEMBER

COMPLAINT (ULP) No. 557 OF 2001.—(1) Shri Baban Babu T. No. 19, Dept. : Packing, (2) Shri Mahadeo Baji, T. No. 23, Dept. : Packing, (3) Shri Balkrishna Tukaram, T. No. 2, Dept. Packing, (4) Shri Ganpat Mahadeo, T. No. 22, Dept. : Packing, (5) Shri Bhikaji Gunaji, T. No. 21, Dept. : Packing, (6) Shri Govind Rajaram, T. No. 21, Dept. : Packing, C/o., Shri Kishore R. Deshpande, A/5, Bakul Niwas, Lallubhai Park, Andheri (W.), Mumbai 400 058.— *Complainant*—V/s.—(1) The Manager, The Modern Mills Ltd., Jacob Circle, Mahalaxmi, Mumbai 400 011, (2) Rashtriya Mill Mazdoor Sangh, G. D. Ambekar Marg, Parel, Mumbai 400 012.—*Respondents.*

In the matter of Complaint of Unfair Labour Practice under item 2 and 9 of Sch. IV of the MRTU and PULP Act, 1971.

CORAM.—Shri V. P. Rothe, Member.

Appearances.—Shri K. R. Deshpande, Ld. Representative for the Complainants.

Shri S. M. Naik, Ld. Counsel for the Respondent Mill.

Shri M. V. Palkar, Ld. Counsel for the Respondent Union.

Order Judgment

(31st October 2002)

The present Complaint is filed by Shri Baban Babu and other 5 employees of Modern Mills Limited, who is the Respondent No. 1. It is alleged in the Complaint that the Respondent is engaged in unfair labour practices under item 2 and 9 of Sch. IV of the MRTU and PULP Act.

2. The Complainants are working in the Packing Dept. of the Respondent Mill. The Complainants have attached the xerox copies of their attendance cards in support of this. The Mill was closed down in the year 1987. The Board for Industrial and Financial Reconstruction, New Delhi (for short, 'BIFR') had declared the Mill as a Sick Unit. In the year 1997, the Respondent No. 2 *viz.* Rashtriya Mill Mazdoor Sangh (for short, 'RMMS') who is the representative union had entered into an agreement in respect of the Complement of 8 workers in the Packing Department. Thereafter there was another agreement dtd. 27th July 2000. On 24th April 2001 the Respondent exhibited the copy of notice of change at the gate of the Mill and further reduction in the Complement of the workers in the Mill sought. The workers have made a written representation to the RMMS on 4th June 2001. The Complainants have worked in the Packing Dept. On 5th June 2001, Shri Balkrishna Tukaram, Complainant No. 3 and Shri Bhikaji Gunaji, Complainant No. 5 were obstructed while entering into the Mill premises and they were told to sign the forms prepared by the Respondents. They were told that there will be no entry in the Mill for work. Thus the workers were denied work. Both of them were told to go home and RW was the remark put on their attendance card. Due to the fear of losing the job, both of them have accepted the other job assigned to them and they were forced to accept the work in the other department. The work in the Packing Department now got done by the Respondent through the contract labour. Hence, it is alleged in the Complaint that the Respondents have engaged in unfair labour practice and it is prayed that they be directed to restrain from such practices.

3. In the Reply of the Respondent No. 1, it is submitted that the present Complaint is not maintainable. There is no violation of Standing Orders and the specific Standing Orders pertaining to breach of items mentioned in the Complaint is not contemplating any bar to give work of the employees to the Contractor. Respondent No. 1 had re-organized its working and there is no violation of item 9 of Sch. IV nor item 2 of Sch. IV of the MRTU and PULP Act. Complainants were originally employees of the Winding Dpartment and Warping Department. They were transferred to the Packing Department. The Complainants at the most have a right to go in the Winding or Warping Department. They cannot claim a right to be re-transferred to the Packing Department. The Respondent Mill is sick. Considering the precarious position

of the Mill, it was found that the Packing Department was uneconomical and the employees therein will be in a position to handle higher position. Thus the Complainants were promoted and paid a higher salary. Thus the Complaint is totally misconceived. There is no case made out to grant any relief.

4. In the Written Statement of the Respondent No. 2 representative Union at Exh. UA-5, it is submitted that the Complainants being the employees of the Respondent No. 1 Mill have no right and *locus standi* to prosecute this Complaint in their individual capacity. The provisions of the B. I. R. Act gives a status of sole bargaining agent to the Respondent No. 2. The Hon'ble Supreme Court decided in Raymond Woollen's case that the rights of the representative union are on better footing than that of the recognised union. Only in the matter of termination of services, the concerned individual employee can directly approach the Court with or without the help of the representative union. There is no failure to implement the settlement, award of agreement. Item 2 and 9 of Sch. IV of the MRTU and PULP Act cannot be invoked in this Complaint. Hence it deserved to be rejected.

5. On the pleadings in between the parties, the following issues were framed at Exh. O-1 :—

(1) *Issues.*— Whether the Complainants have proved that the Respondents have engaged in unfair labour practices under items 2 and 9 of Sch. IV of the MRTU and PULP Act, 1971 ?

(2) Whether the Complainants have proved the violation of Standing Orders by the Respondent ?

(3) Whether the Complainants have *locus standi* to file this Complaint ?

(4) Is the Complaint maintainable ?

(5) Whether the Respondent proves that in pursuance of the settlement in between them, the Complainants, were shifted from packing Department ?

(6) What order and reliefs ?

Findings.— Issue No. 1 :- No.
Issue No. 2 :- No.
Issue No. 3 :- Yes.
Issue No. 4 :- Yes.
Issue No. 5 :- Yes.
Issue No. 6 :- As per final order.

Reasons

6. *As to Issue Nos. 1 and 2.*— The present Complaint is filed under item 2 and 9 of Sch. IV the MRTU and PULP Act, 1971. Item 2 is about the abolition of work of a regular nature being done by the employees and grant of such work to the Contractors as a measure of breaking a strike. Item 9 is pertaining to the implementation of Award, Settlement and Agreement. Oral evidence of Shri Balkrishna Tukaram Shetye adduced on behalf of the Complainants in support of their case. This witness has filed an affidavit at Exh. U-15 in lieu of examination-*in*-chief. In the affidavit he has stated that he joined the services of the Mill in the year 1977 and the Mill was closed in the year 1987. Thereafter it was re-started in the year 1994 as per the order of the Authorities of BIFR. The Complainant Nos. 1 to 6 were then working in various departments *viz.* in Packing, Winding departments. The Winding and Packing Departments merged and then the Winding Department was completely closed. The workmen of that department were given the work in the Packing Department. As per the Agreement dtd. 27th July 2000 with the representative union, these changes have been made. The Complainants had complained to the RMMS Officials and made out a grievance that by assigning the work of the Packing Department to the Contractors, the Mill Authorities wanted to reduce the post in the Packing Department. Thus the Complainants were forced to work in other departments. The Complainant Shri Baban Babu was asked to work in the Open Spinning Department,

Mahadeo Baji in Frame Department, Shri Balkrishna Tukaram in Frame Maintainance, Shri Ganpat Mahadeo in Frame Department Shri Govind Rajaram as Mechanic and Shri Bhikaji Gunaji in Frame Department. In the cross-examination of Shri Balkrishna Shetye, he admitted that he was the member of the RMMS when the Mill was restarted in the year 1994. The nature of work in the Winding and Packing Departments of the Mill is different and occasionally the Complainats were doing such work. It is denied by the witness that in the other Departments where the Complainants were asked to do the work, the wages were more. Individually the Complainant Shri Shetye did not write any letter to the Mill stating therein the reasons for his refusal to go in the Maintainance Department. It is admitted by the said witness that they were not accepting the change of the department and they refused to sign on the forms whereby they were transferred in the other departments. It is further admitted by the witness that in the other departments, the salary was same. The Complainants don't know about the net salary given to the contract labourers in the Packing Department The skill which is required in the Winding Department is not necessary for working in the Packing Department. In the cross-examination by the representative union this witness has admitted that he don't know whether one employee can be transferred from one department of the Mill to the other Department. He don't know about the agreement taken place in between the Respondent Mill and the RMMS on 1st October 2001.

7. On plain reading of the evidence of the Complainant, it is clearly seen that in May, 2001, the Complainants were working in the Packing Department. Their cards of such working are filed as per Annex. 'A' Colly to the Complaint. It is further clear that the Complainants have questioned the reduction in the strength of the employees in the Packing Department. The Ld. Counsel of the Complainant has argued that in violation of the Standing Orders, the changes in work cannot be effected. The attendance cards given to the Complainants are equal to the contract of their service. There is no dispute about the fact that the Complainants were working in the Packing Department and they were transferred to the other Departments. This is clearly in violation of the terms of the service conditions and in violation of the Standing Orders, the changes came to the effected. such a change is not permissible and hence item 9 of Sch. IV has been violated.

8. The Ld. Counsel of the Respondent has submitted that as per Sch. III of the B. I. R. Act, there can be assignment of work and transfer of workers within the establishment. In this regard, the Ld. Counsel has pointed out to me the evidence of witness Exh. CW-1 *viz*. Shri Surendra Ganesh Dhareshwar. He is the production Manager in the Mill. After the general strike in the textile industries, the Respondent No. 1 Mill was declared as a sick industry. It was restarted in the year 1994 as per the BIFR Scheme. The work of packing itslef is not a skilled job, and hence it was decided to utilise the service of the employees of the Packing Department in the Skilled Department and this matter was discussed with the representative union and there was a memorandum of agreement reached in between the parties. This memorandum is at Exh. C-6. There were 8 workers in the Packing Department out of which 2 workers have accepted their posting in the Skilled Department in pursuance of this memorandum. At the time of their transfer from the Packing Department in the Skilled Department, care has been taken that salary of the workers is not effected. Same or more salary is given to them in the Skilled Department. Thus the Mill could save considerable finance by doing this. Cost of packing was Rs. 18 per bag, now it is Rs. 6 per bag. There is nothing in the cross-examination of this witness to support the case of the Complainants. One thing is clear that the Complainants were working in some other departments of the Mill prior to their working in the Packing Department. It is admitted by CW-1 Shri Dhareshwar that there is no documentary evidence filed by him regarding the reduction of the cost in the Packing Department. He cannot say whether the notice u/s. 42 (1) of the BIR Act was given by the Mill, to the Respondent No. 2 for reduction of the strength of 10 workers in the Packing Department. According to the transfer, Complainant Shri Baban Babu was posted in the Open Spinning Department. He had worked in the Ring Department in the past. Likewise the other Complainants had worked in the Drawing, Frame Department and other Departments.

9. In the oral evidence of the Secretary of RMMS as per Exh. UAW-1, he has deposed that the memorandum of under standing was reached in between the Mill and the Representative Union. This MOU is not registered with the Registrar. This witness is not knowing how many persons are working in the Packing Department on contract basis. He admitted that the nature of work in the Packing Department is of unskilled nature and the work in the Open and Spinning Department is of skilled nature. He don't know what type of work Shri Balkrishna Tukaram is doing in the Maintainance Department.

10. The Ld. Counsel of the Complainant has submitted that the MOU of Exh. C-6 is not registered as per the provisions of the B. I. R. Act. Hence, this document cannot be read in evidence and it is not binding on the Complainants. In the MOU it is clearly mentioned that the department of Canteen, Ring-Frame, Winding etc. be closed and the workers who have been rendered surplus due to the closure of the above departments, they will be paid retrenchment compensation.There is a chart given alongwith this document. It is about the present strength and the proposed strength of the Mill workers.

11. As per Sec. 44 (a), there is a provision for registration of the agreement u/s. 42 (4) of the B. I. R. Act. The agreement is required to be registered in respect of the changes desired in any industrial matter under item 5 of Sch. III. So far as our case is concerned, it is very much clear from the record that the Mill is a Sick Unit and to make it viable if some changes have been taken place after discussion with the representative union and such changes are not detrimental to the service conditions of the workmen, how it can be said that merely because the employees are transferred from one department to another department, that by such act of transfer, the Respondents committed an unfair labour practice. Similarly the attendance cards issued to the Complainants cannot be viewed as a contract of their service. It has come on record that the Complainants have worked earlier in the other departments. There is no question of violation of item 9 of Sch. IV of the MRTU and PULP Act. There is nothing on record to suggest that work of regular nature got done by the employees of Contractor as a measure of breaking the strike. Thus item 2 of Sch. IV of the MRTU and PULP Act has not been violated.

12. The Ld. Counsel of the Complainants has made out a grievance that the regular work in Packing Department is got done through the contract labour and Respondent has got done from the Complainants the skilled work. There is no documentary evidence to show that in which department the Complainants were working prior to their transfer in the Packing Department. Thus the changes cannot be effected without giving notice of change. The MOU is not an agreement under the B.I.R. Act. As pointed out eariler, the action of the Mill is covered under item 2 of Sch. III of the B.I.R. Act. It does not cover the changes in the occupation. As per the Standing Orders, the employees whose services have been transferred to other department or post, as a result of such discontinuance or closure, shall be given the option of rejoining their previous post on the re-opening of their dept. Such is not the case as the Packing Dept. is not closed and the departments where the Complainants were working previously are not in existance. Therefore by transferring them to the other departments, no unfair labour practice committed by the Respondents and there is no violation of the Standing Orders. Accordingly I answer the Issue Nos. 1 and 2.

13. *As to Issue Nos. 3 and 4.*—These issues pertain to the *locus standi* of the Complainants to file the Complaint despite of the availability of the representative union and so also regarding the maintainability of the Complaint. As per the provisions of Sec. 28 (1) of the M.R.T.U. & P. U. L. P. Act, any Union, any employee, and employer of any Investigating Officer can file the Complaint and such Complaint can be entertained by the Court within 90 days. As per the ruling reported in *1999 II LLJ 826* (Tata Hydro Electric Power Supply Co. Ltd. & Ors. *V/s.* N. L. Mansukhani & Ors.), workman cannot be prevented from filing Complaint, in exercise of right created by statute and for which statutory remedy is provided. Thus the Complaint is maintainable and the Complainants have got a *locus standi* to file the Complaint. Accordingly I answer the Issue Nos. 3 and 4.

14. *As to Issue No. 5.*—This issue is pertaining to the settlement in between the representative Union and the Respondent Mill. The MOU at Exh. C-6 in between the representative Union and the Mill clearly shows that the parties have agreed to make the alternative arrangement for Packing Department and they also agreed to give the alternative work to the workmen in the Packing Department This is not going to affect their wages. How the Complainants can insist for working in the Packing Department depite of the tight financial position of the Mill. The Ld. Counsel of the Complainant is relying upon the ruling reported in *1957 I LLJ 140* (New Shorrock Spinning and Manufacturing Company Ltd. *v/s.* Textile Labour Union). In this ruling, the department was continued and only there was a reduction in number of persons employed in the Department. It is held that such case falls under item 1 of Sch. II of the BIR Act. If there is any change in the *status quo* is desired or intended by either side, the procedure for effecting the change is prescribed. In the abovesaid case, the employer was directed to maintain the original total strength of the concerned department by employing badlis in the vacancies that had occured. Thus the facts of the reported case are distinguishable from the facts of our case. Here the changes are effected for the economic reasons and no prejudice has been caused to the Complainants. The Complainants cannot force the Mill Authorities to retain them in the Packing Department. The Complainants had worked earlier in the other departments. Thus unfair labour practice as such is not committed by the Respondent No. 1 Mill. For these reasons, I answer the Issue No. 5 accordingly and deem it proper to pass the following Order :—

Order

(*i*) The Complaint (ULP) No. 557 of 2001 stands dismissed.

(*ii*) No order as to cost.

V. P. ROTHE,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 31st October 2002.

S. R. ADAV,
Dy. Registrar,
Industrial Court, Mumbai.
Dated the 13th November 2002.

IN THE INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

BEFORE SHRI P. B. SAWANT, MEMBER

COMPLAINT (ULP) No. 1258 OF 2000.—The PAL VRS Employees Welfare Association, C/o. 4/149, Kalpataru, Nehru Nagar, Kurla (East), Mumbai 400 024—*Complainant—V/s.*— (1) M/s. Premier Automobiles Ltd., Lal Bahadur Shastri Marg, Kurla (W.), Mumbai 400 070, (2) Mr. Vinod Doshi-Chairman, M/s. Premier Automobiles Ltd. Kurla (W.), Mumbai 400 070, (3) Mr. Maitreya V. Doshi, Managing Director, M/s. Premier Automobiles Ltd., Kurla (W.), Mumbai 400 070—*Respondents.*

In the matter of Complaint of Unfair Labour Practice u/s. 28 read with item 9 of Sch. IV of the MRTU and PULP Act, 1971.

CORAM.—Shri P. B. Sawant, Member.

Appearances.—Shri A. R. Mulani, and Shri B. J. Sawant, Advocates for the Complainant

Shri T. S. Shetty, Advocate for the Respondens.

Judgment

This is a Complaint filed by the PAL VRS Employees welfare Association (hereinafter, called 'the Association' for the sake of brevity only). It is alleged that the Respondent M/s. Premier Automobiles Ltd. and 2 othere have followed the unfair labour practices within the meaning of item 9 of Sch. IV of the MRTU and PULP Act, 1971.

2. The facts which give rise to the present litigation can be statedin nut-shell as below :—

The Complainant is a Registered Association and having its members the employees of Respondent No. 1 who have accepted voluntary retirement under the schemes declared by the Company. The Respondent No. 1 is a Public Limited Company, registered under the Indian Companies Act. It had published an early voluntary retirement scheme *vide* notice dtd. 20th December 1991 and 24th March 1992. By virtue of Pension Scheme 'A' the amount will be payable every month upto the date of employees completing the age of superannuation *i. e.* 60 years. It incorporates the formula for incorporating a 20% monthly compound interest also. As per the Pension Scheme 'B', the employees are at liberty to commute 1/3rd part of the full pension and balance 2/3rd part will be payable every month upto the date of employees completing the age of super annuation. The formula of the monthly pension was incorporating 13% monthly compound interest in the pension amount.

3. As per Clause 10 of the Scheme, the Pension would be paid every month till the persen concerned reached the age of 60 years. In case of death before completing 60 years, his legal heirs were to get the Pension as if the employee would have continued to get the amount had he been alive till the age of 60 years.

4. It was assured by the Respondents that the payment of pension will be made promptly and regularly. A letter dtd. 10th February 1992 was issued to Shri Bhatkal, one of the employees, whereby he was informed that he will he getting the pension of Rs. 6028 and the same will be sent to him by post every month. The Respondents infact have made commitments for paying the pension as assured and as per the clause of the Scheme. But inspite of that, the Respondents took out a circular addressing individual letters to the employees who have availed the benefits of monthly scheme and offered them a lumpsum amount towards the balance payment of pension as one-time lumpsum payment. The amount which was offered was considerably less than what amount would have been payable to the employees by way of monthly pension. Thereafter from the month of December, 1998 the Respondents have completely stopped paying the pension to the concerned employees because the members of the Association have not accepted the Respondent's offer of lumpsum payment in lieu of monthly pension. The Complainant wrote a letter to the Respondents requesting not to make any default in the commitment.

5. It is pointed out that in the board meeting, one Shri Doshi was appointed as an Executive Chairman for a period of 5 years and fixed his salary as Rs. 50,000 + perquisites of Rs. 4,50,000. By virtue of the said amount, it is clear that the Company is financially sound.

6. It is also pointed out that by news items declared in the newspapers, the Respondents intended to sell out the property in the market which is situated at Kurla, Dombivli and Pune. By notice dtd. 21st November 2000, the fact was brought to the notice of the Respondents in respect of creating third party interest. With all these instances, it is pointed out that the Respondents by virtue of not paying the pension have committed unfair labour practices. The Respondents have deliberately stopped paying the amount of monthly pension from December 1998 and thereby committed unfair labour practice by adopting the dubious methods by simultaneously calling the parties for purchase of land at Kurla, Dombivli and Pune. This act on the part of the Respondents is by way of defeating the legitimate claim of the members of the Complainant Association. By virtue of that action, the life of members of the Association has become a misery and are not in a position to maintain the family. In some cases, the children are required to leave the college or school. Threfore, the Complaint has been filed by the Association contending that the Respondents have committed unfair labour practice and prayed for the declaration to that effect and consequentially prayed for the directions to pay the arrears of pension, interest thereon, besides initiating the action of paying the monthly pension as previously been paid.

7. The Respondents have appeared and filed their Written Statement *vide* Exh. C-4 contending interalia that the Complaint is not maintainable and it is also false and frivolous and therefore prayed that the same be dismissed with cost. The sum and substance of the Written Statement filed by the Respondents can be stated in nut-shell as below.—

It is the first and foremost contention of the Respondents that the Complainant Association has no *losue-standi* to file the present Complaint as it is not an 'employee' nor it is a 'Union' to file the Complaint. On this count, it is prayed that the Complaint be dismissed. It is also pointed out that the persons on whose behalf the Complaint is filed have already resigned and have ceased to be employees on the roll of the 1st Respondent Company. Therefore they are not 'employees' within the meaning of Sec. 3(5) of the MRTU and PULP Act read with section 2(s) of the I. D. Act and therefore it is prayed that the Complaint is liable to be dismissed.

8. It is a further contention that the Respondent Nos. 2 and 3 are not the necessary parties. They are not responsible for or answerable in their presonal capacities pertaining to liability of the Company. The liabiliity is of a corporate liablity and therefore these 2 Respondents are liable to be discharged.

9. It is pointed out that the Complainant has not furnished the list of members on whose behalf the complaint is filed. It is denied that the Complainant is a registered Association/ Institution. Therefore, the complaint is liable to be dismissed. It is denied that the Respondents have followed any unfair labour practice within the meaning of item 9 of Sch. IV and also denied that the Complainant is a registered Association of the employees working with Premier Automobiles Ltd. It is pointed out that those who offered to retire voluntarily under the scheme were released and were made payments as per the respective schemes. Therefore, they now ceased to be an employee.

10. The Respondent admits of sending a letter dtd. 15th September, 1998 and also that a offer was given for lumpsum payment. The said offer was given on the basis of the agreement entered into with the IND Auto Ltd. and the money received arising out of the same. Inspite of the fact that the lumpsum payment was in the interest of the retirees, it was purposely denied and refused by the employees. It is denied that because of such refusal to accept lumpsum payment, the Respondent has stopped giving the pension. About 100 retirees have come forward and accepted the benefits of lumpsum payment. It is pointed out that due to acute financial crisis faced by the Company, the Company could not disburse the pension to the eligible retirees, though the Company the every intention to pay the pension as and when the financial position permits the Respondents.

11. It is submitted that the resolution fixing the remuneration of the Executive Chairman cannot be construed as an indicative fact of Company having a sound financial position. Besides it is pointed out that the Executives Officers, etc. are not being paid their wages from March, 2000, while the staff members are not paid since April, 2000. It is pointed out that the Complainant has no authority to pursue the Complaint in the representative character within the meaning of Order I Rule 8 of C. P. C. The Respondents are trying to raise funds to meet the statutory and other liabilities by trying to dispose of the immovable property.

12. It is the contention of the Respondents that from 29th September 1997 the Respondent has tried to re-structure its automobile business at Kurla. It has an agreement with IAL for manufacture of Premier Padmini Cars and taxis at the factory. The Company had paid conversion fees on mutually agreed basis for assembling of Premier taxis by IAL. However, the Transport Commissioner had banned the registration of Premier Padmini Cars-Diesel taxis on the ground that the cars emit smoke beyond the authorised level and cause pollution. The said order was challenged in the High Court and the Hon'ble High Court directed not to operate 3-cylinder diesel taxis. Therefore, the Respondents commenced manufacture of petrol engines with CNG fitments with a capital loan of Rs. 7.5 crores. However, about 80 taxis with CNG fittings are lying in the yard unsold and the interest is also mounting as the Respondents could not manufacture more vehicles, which has aggravated the financial crisis of the Company. There is a serious liquidity crunch. In that sense, there is a vast track of land at prime locality at Kurla and therefore the Respondent is discussing with the reputed companies for the development of land and to generate funds to meet the statutory and other liabilities.

13. It is the contention of the Respondent that there is no breach of agreement and also pointed out that item 9 does not attract in the matter. It is denied that the Respondents have deliberately denied the right of the Pensioners and stopped the pension. It is denied that the proposal for sale of land is to defeat the legitimate claim of the Pensioners from December, 1998 onwards. With these and other facts and circumstances, it is the contention of the Respondent that the Complaint filed is misconceived. The Complainant is not entitled for any relief and the Respondents at present have no liquidity of whatsoever nature. Therefore, the grant of prayer is not proper. It is not the case that there is a deliberate attempt on the part of the Respondent to withheld the amount, nor the Company intends to withhold the amount of the Pensioners, but the circumstances are beyond the control of the Company. Therefore, the Respondent Company is not in a position to pay any amount. With these and other grounds, it is prayed that the Complaint be dismissed with cost.

14. On the above averments, following Issues are framed and my findings thereon for the reasons given hereinafter are as follows :—

Issues.— (1) Does the Complainant Association prove that the Respondent though financially sound has not paid the pension as agreed to the pensioners and there by have committed unfair labour practice under item 9 of Sch. IV of the MRTU and PULP Act, 1971 ? (2) Does the Respondent prove that the pensioners represented by the Complainant Association are not the workmen within the meaning of section 2 (*s*) of the Industrial Disputes Act, 1947 ? (3) Does the Respondent prove that the Respondent Nos. 2 and 3 are not the necessary parties to the Complaint ? (4) whether the Complainant is entitled for declaration as prayed for ? (5) Whether the Complainant is consequently entitled for the monthly pension to these pensioners, represented by the Complainant Association ? (6) What is the order and declaration ?

Findings.— (1) Yes. (2) No. (3) Respondent Nos. 2 and 3 are necessary parties to the extent of representing the Respondent No. 1 only and not personally liable. (4) Yes. (5) Yes. (6) As per final order.

Reasons

15. *Issue No. 1.*—This is a unique litigation wherein the employer though has not denied his liability to pay the dues of the employees, has intermittently shrinked his responsibility by offering only a lumpsum amount to the employees. In pursuence of that, it is transpired that employees are alleging unfair labour practices on the part of the employer Respondent No. 1 and inspits of the fact that the employer has not denied his liability to pay. On the contrary, the employer has expressed his inability on account of the financial crunches. On such unique situation, the averments advanced by rival parties need to be concentrated.

16. The PAL VRS Employees Welfare Association has come into existence as a Society registered under the Co-operative Societies Act *vide* Registration Certificate which is at Exh. 'A' alongwith Exh. U-5 annexed to the Main Complaint. The Certificate dtd. 13th September, 1995 and Certificate from the Office of the Charity Commissioner, Mumbai dtd. 31th January, 1996 indicates the existence of the Association. It was admitted fact that the AEW Union (Association of Engineering Workers) was a recognised union functioning in the Respondent No. 1 establishment. By virtue of the same, the Respondent No. 1 has challenged the locus of the Association. The Memorandum of Association pertaining to the Complainant produced on record. Clause 'L' under Column 17 under the head of "Rights and duties of the Managing Committee", it has been specifically mentioned that the formation of Association is to redress the grievances of the VRS employees of the Premier Automobile Ltd., Kurla pertaining to their monthly pension, etc. By virtue of such clause, it indicates that the concern of the workmen regarding the grievance as being put up before this Court, therefore, needs to be discussed at length.

17. Besides the above aspects, this Court has dealt with the issue of maintainability of the Complaint and by its order dtd. 28th November 2002, it is resolved by this Court that the Complaint is maintainable in its present form. Besides the orders passed by this Court, I have referred the observations of the Hon'ble High Cout in a case wherein the Respondent had preferred a writ against the order passed by the 7th Labour Court, Mumbai, directing the employer to pay the money due to the employees. While dealing with the issue involved in the matter, Hon'ble Lordship in para 7 has observed that :—

> "According to the record, the said Association is formed specifically to prosecute the claim which is involved in these proceedings."

Then reliance is placed on the observations of the Hon'ble Supreme in a case of D. S. Nakara and Ors. v/s. Union of India *(S. C. 1983 AIR 130),* whrein it is observed that :-

> "Any member having sufficient interest in the cause can maintain an action for judicial redress for public injury arising from breach of public duty or from violation of some provision of the Constitution or laws and seek enforcement of such public duty and observance of such constitutional or legal provision."

If we apply this ratio to the present proceedings, then it must be held that the Respondent No. 1 has a *locus-standi* to agitate the cause under the said Act. By virtue of these observations, it is therefore clear now that this Court is not required to make any endeavour for searching out as to whether the Complainant Association has any *locus-standi* or not. Though the Writ has been finally decided in favour of the Respondent Company, the observations remain as it is. These observations pertaining to the locus of the Association have to be valued and therefore it is not necessary to re-open the topic for agitation pertaining to the fact that the Association has a locus to file the present Complaint to agitate all the grievances of the members of the Association who have opted for VRS.

18. Pursuant to the text of drafting the Issue No. 1 it has to be split up in 3 aspects to enable this Court to have a detail discussion and observations on the issue involved. As stated earlier, the situation before us is very precarious. The employees who have submitted their resignations are now not getting their wages nor their pension. Therefore, the averments that the Respondent Company has purposely stopped the pension needs a careful scrutiny. Such averments are based on Respondent Company's having a sound financial position. Therefore, it is necessary for this Court to make some expert remark pertaining to the financial position of the Company and that sense of following an unfair labour practice within the meaning of item 9 of Sch. IV. There is no grievance about non-payment of earlier pension or agreement to pay the pension. That aspect remains as it is because all the documents on record are nothing but an indicative fact of employees not getting the pension.

19. The word "employee", therefore, has also been opposed by the Respondent pursuant to the fact that these employees have now resigned and they are not the employees within the meaning of Sec. 2 (*s*) of the I. D. Act read with Section 3 (*5*) of the MRTU and PULP Act. The details of such averements can be discussed while dealing with the subsequent issue, but the earlier issue will have to be answered only after making 3 parts of the same. First is of Respondent having a sound financial position, second of non-payment of pension and thirdly of following of unfair labour practice. All these 3 instances are related to each other. They are intermingled. However, each is required to be construed and considered one by one to come to a proper conclusion.

20. For clarifying the financial position of the Respondent No. 1 Company, the Annual Report for the years 1998-99 till 2001 are produced on record and these can be taken into consideration for verifying the finanial position of the Company to find out the accumulated losses if any and the liquidity of the Company as well as accumulation of finances from the sale of fixed assets and by sale of cars, etc. so far as the financial position of the Company prior to introducing and implementing the VRS Scheme.

21. The backbone of the contentions of the Complainant is on re-appointment of Shri Vinod Doshi as Executive Chairman of the Board of Directors of the Company for the period of 5 years. This document has been relied on mainly on the ground to agitate the contention of the Company that its financial position has become precarious, making it impossible for the Company to pay the monthly pension. I have verified the letter pertaining to the appointment of Shir Doshi for a period for 5 years. The abstract of Sec. 302 of the Companies Act, 1956 has been given in the said letter showing all the specified instances of perquisites given to Shri Doshi inclusive of his monthly salary. The salary given to Shri Doshi is Rs. 50, 000 p. m. and perquisites are amounting to Rs. 4,50,000 p. a. which is inclusive of housing, medical, leavel Travel, club fees, medical or accidental insurances. In addition to that, the Chairman is given the benefits towards the P. F. contribution, gratuity, earned privilege leave, encashment of leave, commission preferring to the net profit of the Company in a financial year. It has been made clear that even in case of a loss or inadequacy of profits in any financial year, the Chairman shall be paid the remuneration, perquisites and benefits as montioned in the letter dtd. 16th October 1999.

22. Pursuant to the above details, as envisaged by the Complainant, admittedly on the face of record it appears that unless the Company has a sound financial position, such huge offer could not have been given. While preparing the budgetary provision for the next year, the proposed income and the manufacturing activities or increase in business, etc must have been taken into consideration. Pursuant to that, the contentions on behalf of the Respondent No. 1 when raised about the losses, then it is clear that inspite of that position, the Chairman must have been paid all his remuneration and perquisites to follow the compliances of the terms of letter.

23. The Vice-President of the Company Shri Krishnamurthy has placed reliance on a statement about the current liabilities of the Company an on 31th March 2003, produced at Sr. No. 7 with Exh. C-29. The details under the column are under the head of Sundry Creditors or unpaid VRS items and other unpaid items are included in the said list, which includes unpaid remuneration to the chairman of the previous year amounting to Rs. 6.69 lacs as on 31st March 2003 and unpaid remuneration to the Chairman for the current year is amounting to Rs. 3.84 lacs. The letter issued to the Chairman if read in between the lines again, the monthly salary shall come to Rs. 50,000 which will be accumulated to Rs. 6 lacs per year. If the statement relied on by the Respondent Company is taken for consideration, then the figure 6.69 lacs being the unpaid remuneration to the Chairman of the previous years will show that part of the payment and perquisites have already been paid because the perquisites of Rs. 4, 50,000 p. a. appear to have been given as the unpaid remuneration shown in the chart is to the extent of figure of monthly remuneration only. Besides that, the word “years” is used and not the “ previous year" so far as the unpaid remuneration is concerned. Construing the word “year” as plural, it is clear that the accumulated unpaid remuneration is not the entire remuneration but is some part of it. To clarify this anamoly, I have to reiterate again that in the previous years, the Respondent might not have paid the part of the remuneration to the Chairman, but it will itself not reflect that the Chairman has not been paid at all anything, as envisaged in the letter dtd. 16th October 1999. The instance of paying the amount to the Chairman will only reflect that there is a cash-flow with the Company to meet the monetary findings to a certain extent.

24. The another aspect which was envisaged before me is that of the transation entered into by the Company with the Fiat Indai Ltd. and Ind Auto Ltd. It is in the oral evidence of Shri V. S. Bhatkal about the aspects of financial position of the Company. In para 8 of the cross-examination, he has admitted that the Company has offered a lumpsum payment to these pensioners when the manufacturing activities were transferred to Fiat India Ltd. To persuade the point of financial implications, the Respondents have relied on the Chairman’s report of 1998-99 and 2000-2001. The report of 2001 relates to development of real estate and has formed a part of Director’s report. On a cursory look to the Annual Report of 1998-99, it is seen that the Chairman has made a note about the joint vanture with Fiat Auto by way of new project of Light Multi-utility vehicle *i. e.* for re-positioning the PAL Industry in the entire automobile stenario. The proposal has been given for rehabilitating and revitalising the other wise closed factorise. A sence and substance of the Chairman’s report is an indicative fact of the industrial scenario in front of the Respondent Company especially the manufacturing activities. Besides this aspect, the report discloses about the land development by pointing out that the land at Kurla is a residential land and has received the approval of development. So also the land at Chinchwad and Dombivli is also proposed to be explored for development for residential purpose. It is the expectation of the Chairman in his report of achieving good business and improvement of financial business. The same views are expressed in the Annual Report of 2000 and 2001. The proposals about the land transaction were initiated. However, it has been intervened by the order of the Collector and the transaction is still held up.

25. On all the background of calamities occured, according to the Respondents, the financial position of the Company has gone down to such an extent that it has made the Company impossible to pay off the liability of monthly pension. The reason for such downfall of the company has been tried to be explained by Shri Krishnamurthy in his evidence *vide* Exh. O-5. According to him, since 1992 the process started slowly when the Govt. of India has liberalised the economic policy. Simultaneously there was a general recession in the automobile industry and the Company had an unsold stock costing Rs. 50-60 crores. This might have made it impossible for the Company carry on the dead weight of the employees and thereby the VRS Scheme must have been motivated. There was a lock-out of the Company in between June, 1996 till November, 1996 by which the UNO Project of the Company could not be implemented properly. The car was manufactured by PAL at Kurla. A joint venture with Fiat Auto was also entered into from 29th September 1997, but the same project also could not be materalised because of the lock-out and strike. The car could not be manufactured as per the orders.

Simultaneously due to the joint venture with Fiat India, the factory inclusive of machinery and employees was transferred to Fiat India. While having a pause at this juncture, it appears that in the year 1997, the process of transfer of undertaking had taken place. If Sec. 25-FF of the I. D. Act has come into force by such transaction of transfer, then the document to that effect is not on record to find out what was the transaction as such or what were the terms which were settled or otherwise, in between. However, when it is said that the entire plant and machinery was transferred, obviously the manufacturing activites at Kurla Plant have come to a standstill. This position of 1997-98 has to be reckoned.

26. Pursuant to the above position, the evidence of Shri Krishnamurthy clearly discloses that the manufacture of premier Padmini cars shall be continued, but through Fiat India Pvt. Ltd. and the Respondent Company shall give all the assistance exclusively towards components and parts, on the job-work basis. The said production was also stopped in 1998 and thereafter the demand of the said car for taxi purpose has been reduced considerably. The only availability of diesel engine for teaxi was in process. However, the said manufacturing process was also stopped by the order of the Transport Commissioner. That order came to be passed on the random survey made by the Transport Commissioner by taking 2-3 diesel cars plying on the road and found that there are defects as the cars are making high level pollution and therefore it was ordered to stop the manufacture of such cars.

27. Such instance has been interferred by the Order of the Hon'ble High Court as the order of the Transport Commissioner is set aside. The submission was made that the cars checked by the Transport Commissioner were having 3 cylinders, while the cars which were manufactured at Kurla were having 4 cylinders, by virtue of which it is mentioned that there was a change of engine by the taxi drivers themselves without getting the engine tested from the Company. Till the date of quashing the order of the Transport Commissioner, there was no production of diesel engine of taxis till October, 2000. By virtue of this, the financial position according to Shri Krishnamurthy has become very bad to worst.

28. The losses were mounted in 1998-99 to 12.60 crores. Admittedly the annual report of 2000 indicates a profit of 1.60 crores after depreciation. This has been explained by pointing out that it is by way of conversion of land from fixed asset to stock-in-trade and not due to manufacturing activity. Because of the non-production or stoppage of manufacturing activities in the year 2001, the losses accumulated to Rs. 11.03 crores.

29. On this background, the case as made out by the respondent about the financial position and the circumstances making it impossible for the Company to pay the pension. The financial repercussions of all the instances has affected the pensioners much, and by priority. Immediately after and when it was sensed for the first time in the year 1998 by the Respondent that the manufaturing activities are going to be affected, the Company first had a thought of the Pensioners and thereby made a proposal for a lumpsum amount and thereafter expressed the inability to pay the arrears of pension and thereafter stopped the monthly pension. The recession in the industry, therefore, is said to have affected the finances of the Company, which has resulted into the stoppage of pension to these pensioners.

30. In the above process, the submissions on behalf of the Complainant is two-fold. First is of Respondents having a finacial resources and secondly is of the intention of the Respondent Company to deprive these workmen from getting their further pension as these persons have refused to accept the lumpsum amount. Admittedly, the pension has been delayed. Delaying the pension from 1998 onwards has to seen from the angle that the Respondents have during the process of continuation of this Complaint, deposited an amount of Rs. 40,34,246.90 in this Court. The said amount was towards the pension to the Pensioners and accordingly it was disbursed by the association amongst all these Pensioners, but subsequent to that, the amount could not be disbursed. This is a fact. The fact in issue is that of non-payment of amount, whether will be amounting of following of unfair labour practice by the Respondent. To find out the real crux of the matter, I cannot go ahead without going through the admission given by the witness Shri Bhatkal that.—

"It is a case of delay in payment of pension and not denial of payment".

Pursuant to such admission, it is also necessary to see as to whether the delay caused by the Respondents is meaningful, purposeful, intentional or it is because of the circumstances which are beyond the control of the Respondent, Pursuant to that aspect, I refer to the balance-sheets again with a view to point out what was the gain of the Respondent No. 1 out of its transaction with Fiat India Ltd. The evidence of Shri Bhatkal and Shir Krishnamurthy renders two distinct aspects. First is of transfer of undertaking in its entiretly and the second is of having a joint venture with Fiat India Ltd. In either way, the Respondent Company has parted away with the plant and machinery. Therefore, for that sake, the valuable consideration received by the Respondent, company is not reflecting out of the available record before the Court. Secondly, the manufacture of Premier Padmini was given to Fiat Auto on job-work basis. Therefore, for the sake of arguments even if we accept that Fiat India has manufctured the Uno or Premier Padmini for the taxi purpose, even in that case the question was no the pending orders which were waiting for a long and considerable period. Secondly, there is no iota of evidence showing that the cars manufactured by Fiat India Ltd, On job-work basis were being sold by the Respondent Company on the background that the diesel engine was procurring pollution and is crossing the pollution level and there by there were direction of the Transport Commissioner for stopping the manufacturing process. It is, threfore, very clear that the manufacture of Prember Padmini Car though reflects from the record, the sale of such cars does not reflect. On the contrary, the record shows that the manufacturers were compelled to stop the production. In view of these calamities, the financial resources of the Respondents were automatically restricted towards the earlier transaction with Fiat India and thereafter to sell out the land available at Kurla, Chinchwad, Dombivli, etc. The said transaction when bought to the market, it has fetched some earnest money, from which some activities of the Respondent Company were kept rolling and some amount was intended to be offered to these employees.

31. On the above contentions, the term "sound financial position" reflects from the draft of the issue, referred above. Therefore, has to be carved out from the transaction of sale of land and the stock available with the Company. No more expectation could be made to fetch some amount out of the manufacturing process of the Respondent Company, To construe these propositions and to find out the financial position of the Company, we are required to go through the volume of documents produced by both the parties. Exh. 'J' to the main Complaint is a notice dated 9th February 1999. By the said notice it was informed that the payment of pension of January, 1999 has been deferred due to acute financial crisis faced by the Company. It is further pointed out that the dates for payment will be informed to the concerned in the first week of March, 1999. By Exh. 'K' dated 15th Feberuary 1999, the association replied the said notice denying all the avarments in the notice.

32. Then there comes Exh. 'M' (Exh.-U-49) which is a letter dated 4th January 2000 issued by Premier Automobiles Ltd. to the Commissioner of Labour, Mumbai. The letter was sent in response to the querry made by the Commissioner with the Company about the non-payment of pension to the Pensioners. The reason for Company's remaining in arrears in pension to these VRS Pensioners has been enunciated and in Clause 2, it has been mentioned that :—

> "With the re-structuring of Kurla business stated above the past liabilities *viz,*dues to the Bank as well as financial institutions were also transferred to IAL as part of tranfer of Kurla business. with the rusult, PAL became debt free."

It is, therefore, very clear that the tranfer of Kurla business was in pursuance of re-structuring the automobile business. In pursuance of that, Fiat Auto. SPA Italy are the recipients of the business and it has become a joint venture between these 3 establishments. In any case, what is importent to note that the Respondent Company has become "debt-free". This aspect postulates that whatever earlier financial bindings were there, same were redeemed in pursuance of re-structuring of business, which has resulted into making the Company as debt-free. Clause 8 of the said letter also discloses Respondent Company having substantial assets in the form of land at Kurla, Dombivli, Chindhwad-Pune. The Company has been receiving offers for sale of the same and it is assured that after materialising the sale transaction, the Company will

give top priority for payement of pension to the VRS Pensioners. Pursuant to this fact, the contentions of all the Pensioners regarding establishment of seperate fund, etc. by the Respondent Company is now no more under consideration and it is clear that what has been proposed by the Company for paying the dues especially to the Pensioners is out of the sale proceeds after selling the land at Kurla, etc.

33. After reading the letter Exh. 49 in the above context, it is clear that the contentions of the Company are three-fold. At the first stage, the Company has explained how it has become indebted and in the second phase it has been explained how the debts have been repaid and how the Company has become debt-free and the third aspect is aobut the available resources of the Company and concentration of the Company on the sale of land only. It reflects that the Company admits liability and the fact that the payment of pension has remained back. Therefore, the Respondent is waiting for materialiing the said transaction only and is alleging the interference of the Collector, Mumbai against the said deal, claiming 50% of the sale-price for the Government. To clarify this aspect, one has to re-assess the sources available with the Respondent for paying the pension.

34. Pursuant to that, Clause 10 of the Scheme dated 20th December 1991 produced at Exh. U-36, reads as follows :—

> "Pension would be paid every month till the person concered reaches the age of 60 years as per the Company's records. In case of death of an employee after his opting VRS, his legal heirs will continue to get the pension as may by applicable in respective schemes, as he was eligible till the date the employee was to complete the age of superannuation."

The above term postulates that the Company was well aware of the fact that it has a responsibility to pay the pension till the age of 60 years of such Pensioners. Pursuant to this, *vide* letter dated 10th February 1992 (Exh. 'D' to the main Complaint), the pensioner was informed by the Company of the liability of the Company. The words embodied in the said letter are very unique and thereby need to be reproduced.

> "Please be rest assured that the Management of Premier Automobiles regards the action on your behalf as important in securing the future of the Company and hence will accourd the highest priority and importance to ensuring that all your pension payments in future are promptly and regularly remitted to you."

By letter dated 11th February 1992 (Exh. 'E' to the main Compaint), the monthly pension has been fixed pertaining to that particular employee by informing him that the same will be remitted to him by post in the first week of November. I have reiterated the contents of all these letters to point out that knowing it full well the responsibility of the Compay, the State has made the employees rest assured for getting the monthly pension.

35. Therefore, this particular fact indicates that the Respondent must be under a correct calculation of the *view* having regard to the resources available with the Company and the resources which will remain with the Company or the resources which will be transposed to the Company, Therefore, before fixing the policy matters, it has to be presumed that the Company and its finance Depatment/Section has or must have chalked out the prospects of the scheme. Therefore, the Company when was well aware that the total number of employees who were likely to opt for VRS, total number of employees who have opted for VRS by virtue of which the total of monthly pension and the span till which such amount of monthly pension will go on. Having regard to these aspects, the presumption in this regard has to be drawn that when the scheme was drafted, the financial resources were readily available with the Company.

36. It is very pertinent to note that the Respondent Company was manufacturing Premier Padmini and has undertaken the Uno Project. pursuanth to that, the obstruction of such production programme has been pointed out so far as the order of the Transport Commissioner is concerned. However, that was pertaining to the manufacture and sale of Premier Padmini with diesel engines (137-D) used for taxi purpose only. No proper explanation is forthcoming far as the manufacturing and sale of Petrol Engine Cars and the orders which were prosperring

so far as Uno cars are concerned.Admittedly the order of the Transport Commissioner has been set aside by the Hon'ble High Court, but a considerable period has been lapsed in between and during that period, the manufacturing activities were stopped.

37. *Vide* letter Exh. U-49, the Respondent has pointed out that the finances were crippled due to prolonged lock-out which was going on for 6 months from 5th June 1996 to 5th November 1996, The operations of new Project of Uno was also affected and the third reason is of the recession in the automobile industry due to entry of foreign companies in the business. In my opinion, the recession and prograssion in the automobile industry business in a common phenomenon while running the business. These calamities cannot be considered as a natural calamities, but those are obvious situation in a running business. Terefore, while considering the business point of view, the previous bindings especially financial bindings to the employees, these are having a pre-supposition of expenditure, for which the accumuation of funds is always to be assured or proposed. Therefore, once a major section of the employees have opted for VRS, the requirement of funds and the accumulation there of was expected and not by pre-supposing coming of the prospective buyers and the prospects of the newly launched car, etc. Admittedly, there has to be a flow of business and apparently of money from it and that is for the subsistence of business, as initiated and for the earlier bindings, a provision has to be made or should have been made.

38. Pursuant to the above contentions, the Respondents appear to have placed reliance on the loss of business in between the 19 months when the order of the Transport Commissioner was in force and the lock-out initiated affecting the Uno Project. Such instances were affecting the future business and the assurance for the monthly payment of pension was much prior to that. Therefore, though the future loss of business might have affected the process of paying the monthly pension, cannot be conclusively held that these two instances are the only cause for non-payment of pension. The resources available with the Respondent could have made them to pay the pension for a further considerable period, had it been decided or desired by the Respondent.

39. At this juncture, I have referred the oral evidence of Shri Krishnamurthy (Exh. 5) who has explained the situation wherein the Company was required to face when the VRS was declared. According to Mr. Krishnamurty, in the year 1992, the Govt. of India has liberalised the economic policy. Therefore, is during these years there was a general recession in the automobile industry and the Company remained with the unsold stock costing about 50-60 crores. He has pointed out the instance of lock-out and also the fact that the activities by Premier Automobiles were transferred to Fiat India Ltd. and therefore there was no manufacturing activity at Kurla. while transferring the business, the Company has transferred the factory inclusive of plant and machinery and all facilities as required. Construing these propositions, the qustion has rightly been raised about the gain by the Respondent out of the transaction within the meaning of Sec. 25-FF with Fiat India Ltd. At the pursuasion of the Court, the Respondent has produced under a sealed cover, a document pertaining to the said transaction *viz.* "Deed of Assignment" for the perusal of the Court. It indicates that :—

(1) Assigner has agreed to transfer and assign its entire Uno Under-taking and business as a going concern including land and buildings.

(2) Their Assets.

(3) Intangible Assets.

(4) Uno Losses start-up and Development Cost.

(5) Financial liabilities.

(6) Current Assets and Liabilities.

(7) Provision of contracts; and

(8) Employees of the Assignor.

40. Taking a pause at this moment, till the deed of Assignment has been entered into on 30th March 1998, the liablility of the monthly pension of these Ponsioners was outstanding and it was within the knowledge of the Company that the Company will be having to require to pay the said amount to these employees, which admitteldy being paid till December, 1998. However, such liability of the employees who were in the employment and have severed their relations prior to the date of superannuation, could have been included. The Ld. Advocate Shri Shetty T. S. has submitted that while entering into the Deed of Assignment, the liabilifty of these employees was not specifically taken by the Assignee as because in that case, the Deed could not have been materalised. Therefore, a positive statement is made before this Court that the liability of these VSR employees was kept back as because it was the liability of PAL Annex. 'A' to the Deed of Assignment explains the liability Uno Booking only. This aspect also carries an importance from my point of view because an opportunity was available with the Respondent Company to get the liability settled of the VRS employees settled. Inspite of that, the Respondent remeined in a position of paying the dues of these VRS employees, though the manufacturing activities were at a standstill. This is an indicative fact of having available resources with the Respondent.

41. The another aspect of having a financial position of the Respondent is that of getting the Fiat diesel cars manufactured on job-work basis from Fiat India. The production, therefore, on job-work basis was carried forward till 1998. The demand for the diesel taxis has considerably reduced, according to Shri Krishnamurthy, so also of the Petrol cars. These two types of cars, therefore, were being manufactured till 1988. There is no whisper in the evidence of Shri Krishnamurthy that PAL has stopped manufacture of Petrol Cars known as 'Premiar' Padmini' Therefore, the market value or the cars sold by the Respondent appears to have not been accounted for after the Deed of Assignment with Fiat India Ltd. Simultaneously the order of Transport Commissioner was passed in August, 1999. Therefore, after the Deed of Assignment with the Fiat India Ltd., the manufacturing of diesel cars on job-work basis must have been going on till August, 1999. This fact postulates that the business of sale of Premier Cars was going on till August, 1999 and there are chances to say that there was availability of funds out of the sale transaction of Premier Cars.

42. Going ahead with these facts and the evidence of Shri Krishnamurthy, who has said that the financial position of the Company had become bad to worse, which is reflecting in the Annual Reports of 1998-99, showing losses to the tune of Rs. 12.60 crores after depriciation. But Such situation does not appear out of the Annual Report for the year 2000, showing a profit of 1.60 crores after depriciation. In the event of execution of Deed of Assignmant and business fetched out of Sale of premier Padmini Cars, the amount accumlated by the Respondent Company needs to be taken care of.

43. As seen from the text of the Deed of Assignment, there was no cash transaction actually had taken place and it has been entered into by issuing 32,00,000 equity shares of Rs. 100 each at par, credited as fully paid-up aggregating to the nominal value of 32 crores of rupees. This particular aspect indicates that no cash-flow could flow directly into the hands of the Respondent Company after the sale transaction. Therefore, till August, 1999, the Respondent has lost its plant, machinery under the Deed of Assignment. The manufacturing activities were stopped by PAL independently and the manufacture of Premier Padmini as a joint venture with the Fiat India Ltd. could go on for a short period only. Therefore, though the equity shares were received by the Respondent, no cash came into the hands of the Respondent. Therefore, we cannot think of the cash-flow or available resources with the Respondent on account of transaction with Fiat India Ltd.

44. Whatever resources availablie were already with the Respondent, which made them to continue the operation till Dcember, 1998. The part of the money which was depesited in the Court, fax was disbursed amongst the VRS employees towards their pension dues, and the same was not of the earnest money received from the intended Purchaser and how the transaction has stuck down with the office of the Collector. Pursuant to all these aspects, it is clear that from 1999 onwards, though the Respondent was maintaining some staff, the Respondent cannot be said to be in a sound financial position inspite of the fact that it had and money for survival alongwith the available staff.

45. So far as these contentions and the earlier elaborate discussion, the same was for consturing the term "sound financial position." The question now comes for following of the earlier assurances is concerned, the point of having sound financial position or not having any sound financial position or not having any sound financial position will not affect much because the term of item 9 of Sch. IV is rather unique, as it discloses that item 9 comes into operation whenever there is a failure to implement, an award, settlement or agreement. The VRS Scheme was offered to the employees. Therefore, for forming a valid contract, is requires the proposal and acceptance. By construing the entire scheme and acceptance of employees for getting the pension benefits itself conclusively disclose that there was a proposal by the Company offering them certain monetary benefits under the VRS Scheme 'A' and 'B' The terms and conditions underlying the scheme itself were disclosed to the employees. Such disclosure was within the knowledge of the employees who have opted for VRS. Therefore, the requirement of valid contract and fulfillment of the agreement entered into for paying the pension after severing the relations with the Company by an employee has acquired a sanctity. Therefter, Clause No. 10 of the VRS Scheme and the acceptance by a letter dated 10th February 1992 (Annex, 'D' to the Complaint) as well as Annex. 'H' *i. e.* letter dated 21st May 1997 indicates that the Respondent Company has on and often reiterated its responsibility and liability to accept the amount of calculations. Therefore, it is very clear that the acceptance of VRS Scheme was by keeping a faith in the Company that it will perform its part of assurance to pay the amount. Ultimately by a notice dated 9th February 1999, the Company has indicated the acute financial crisis and thereby since then the payment of monthly pension has been stopped This has become a hurdle in the scheme, amounting to commission of breach of the Agreement.

46. To construe these propositions and to find out whether it falls under the purview of unfair labour practice, I have referred to the abovesaid letters and on the face of record and in the plain meaning, it is clear that there was an agreement for paying the amount and it has been breached by non-payment.

47. The Ld. Advocate Shri T. S. Shetty has vehemently sub-mitted that a simple default of non-payment of the amount cannot be termed as a refusal to implement an agereement. The canpacity to pay and non-payment should be deliberate. To substatiate his contention, he has relied on the observations in the case of Kanaiyalal Prabhudas Maru and ors. *V/s.* Regional Provident Fund Commissioner, Maharashtra and Goa and ors. *(2001 III CLR 448),* wherein it is ruled that :—

> "In order to estalish a neglect or refusal something more than a default must be established. Neglect or refusal implicates an element of bad faith reflecting a dishonest attempt to evade the payment of dues."

These observations have come out of the fact of outstanding Provident Fund dues. An enquiry was initiated by the Assistant P. F. Commissioner U/s. 7-A of the EPF Act and order came to be passed assessing a sum of Rs. 19,24,826, which was found to be due and payable. They Petitioner Company was having its outstanding dispute with the Customs Authority and it was requested to pay the dues directly to the P. F. Authorities, On this broadline of facts, it is ruled that a bad faith of dishonest intention must of be seen. Hon'ble His Lordship has relied on the observation in the case of V. Ganesa Nadar V/s. K. Chellathai Ammal (AIR 1989 Madras 8), wherein it is held that :—

> "Refusal or Neglect envisages a capacity to pay, but a deliberate non-payment."

48. Considering these observations of the Hon'ble High Court, the question before us has to be found out as to Whether in the given Circumstances and facts on record, can it be said that there was a refusal to pay or neglest to pay though there is a capacity to pay. As discussed earlier, the discussion has come out of the situation that though the Company was nothaving a sound financial position, it had some cash-flow and mainly the source was of the intended transaction of selling the plant. In between the time, the Respondent has prepared a proposal for a lumpsum payment for the remaining period of the pension. The calculation is made on actuarian basis, concept of which has been approved all over. The offer of lumpsum amount has not been accepted by those who are the members of the Complainant Association, Therefore, it cannot be said that those who have accepted, have exonerated the Respondent from the allegations that the Respondents have followed the unfair labour practice within the meaning of item 9.

49. What is required to be seen is that by putting up all these circumstances, whether the Respondent company was justified in offering the payment in lumpsum. The question of legality of the Actuarian calculations will not come over here. What was agreed by the Respondent Company is to pay the pension till the age 60 years and those who have opted for was VRS Scheme No. B, they were also entitled for the 2/3rd part of the pension till their age of 60 years. Therefore, what was required to be done was to make a provision or to continue to pay the amount, as agreed and not to calculate the lumpsum amount in between and offer it to the employees.

50. I have made such contentions at this juncture by pointing it out that the employees who were offered a lumpsum amount were at loss by receiving the lumpsum amount. If a straight-jacket formula is made applicable to the offer, it will reflect that the offer is much less than the calculation of the monthly pension till the age of 60 years *i. e.* superannuation. The explanation to this anamoly has been offered by the Respondents by pointing out that when the actuarian calculations are being made, it is presumed that the employee who has to receive the amount in lumpsum shall keep the said amount in a Bank and shall earn interest thereof. If the interest @ 12% is calculated, so far as one time lumpsum amount is concerned, then the said amount interest will come to the figure which the employees would have got by accumulating their monthly pension till the date of their superannuation. As said earlier, I don't intend to comment on the legality of the actuarian calculation, but we have to go behind the intention of granting the VRS or behind the intention of the employees in accepting the VRS Scheme.

51. Admittedly the acceptance of VRS has reduced considerably the weight of man-power on the Respondent Company. The employees who were nearing the age of superannuation were to get the pension till the age of 60 years without doing any work other benefits. It was a very lucrative offer and was accepted as a whole by the employees. Threfore, the intention to facilitate the employee till the age of superannuation without doing any work has now been furstrated because of the stoppage of pension. It is amounting to the refusal to perform the part of contract. The defence of non-availability of funds, therefore, is of no avail in this regard.

52. At this juncture, Ld, Advocate Shri A. R. Mulani for the Complainant has submitted that the failure of business or failure in getting the appropriate returns from the business is not the fault of the employee. There fore, for the fault of the employer, the employee cannot be made to suffer. He has relied on the observations of the Hon'ble Lordships of the Apex Court in a case of Jaipur Zilla Sahakar Bhoomi Vikas Bank Ltd. V/s. Shri Ram Gopal Sharma and ors. (2002 LIR page 237) It is a case of failure to file an application U/s. 33-2 (b) of the I. D. Act and the employee has been dismissed. The rule laid down by the Hon'ble their Lordships is that :—

> "An employer who does not make an applicantion under section 33 (2) (b) or withdraws the one made, cannot be rewarded by relieving him of the statutory obligation created on him to make such an application. It is so does, he will be happier or more comfortable than an employer who obeys the command of law and makes an application inviting scruting of the action taken by him."

I am in careful abidance with these principles laid down though the facts differ. As said by Hon'ble their Lord-ships, the employer cannot be permitted to take advanage of his own wrong. The interpretation of statute must be such that is should advance the legislative intent and sarve the purpose for which it is made rather than to frustrate it. In pursuance of this factum of breach of payment of amount shall be the only prominent aspect and no other aspect can be taken into consideration.

53. The Hon'ble Division of our High Court in a case of Executive Engineer, Electrical Division, Nagpur and anr. *V/s.* Prakash Devidas Kalasit *(1985 Mh. L. J. Page 338),* have given a rule that :—

> "Motive or mens rea is not an essential ingredient forholding the employer responsible in or to have indulged in unfair labour practices. It is not necesssary that motive must precede or should be the basis for declaring an action to be an unfair labour practice. If the impugned action attracts any of the items in Sch. IV there could be no impediment for the Courts to hold that such action or actions constitute an unfar labour practice."

Pursuant to these observations and testing them with the facts of the instant case, it is clear here in this case that the employer though entered into an agreement to pay the monthly pension, has stopped paying the pension. This results into a cause of action for the Complainant to file the Complaint, Such default in paying the pension covers item 9 of Sch. IV The solitary act or an act independent it its nature of committing a default is important in itself. Therefore, such act of non-payment does not attract that there should be a guilty mind behind it in not paying the further pension. The default committed or occured itself is sufficient for covaring the item. Therefore, the facts in the instant case are required to be tested alongwith the facts of the case referred above in its proper prespective, pointing out that there is a sence of following of unfair labour practice in view of the default committed in the hands of the employer.

54. The evidence of Shri Krishnamurthy in this regard is required to be concentrated again as he has again reiterated about the decrease in the financial position and thereby again reiterates about the liability of the Company. In para 11 of his examination-in-chief, he has submitted that the liability on actuarian basis was ascertained by the Company alongwith the available finances and then the Compay has come to a certain lumpsum amount proposal and offered it to the pensioners. It is, therefore, very clear that even in the year 1998 onwards, the Company had some money available and the calculation for lumpsum amount on actuarion basis was resorted to without persuading the matter of sale of land or making efforts to get the financial resources.

55. The Ld. Advocate Shir T. S. Shetty has vehemently and stranously made efforts to convince the Court on the point of the intention of the Respondent Company in paying the dues of the employees. It is the contention that it is a case of force majeure, means the circumstances which are beyond the control of the Company. I do agree about the instances occured in the previous past like the lock-out, strike and the stoppage of manufacturing of diesel engines of Premier Padmine. However, inspite of these calamities, the resources have not stopped coming into the hands of the Respondent No. 1 Company and the Company even in the year 1998 is in a position to pay the lumpsum and handsome amount to these VRS Pensioners. Shri Shetty has relied on the observations in the case of Jolly George Varghose v/s, The Bank of Cochin (AIR 1980 S. C. 470). These observations are relied on in the above-referred case of Kanhaiyalal Prabhudas Maru. In that regard, the question of intention, neglect will not come into play, but only the overt act of refusal to pay shall be reckoned in the context of alsogation of committing breach of the agreement or setlement. It appears from theentire scenario that the Respondent was rest assured because of having the fixed assets in their hand. However, on the other hand, such fixed assets are reflecting the financial position of the Company. In that context, the overt act of non-payment of amount has brought the same under the clutches of item 9 of Sch. IV.

56. It has also to be noted that in the evidence of Shri Krishnamurthy, para 23, he has accepted that the plans for paying the lumpsum amount was to be materialised after selling out the stock of Padmini cars in the open market. It was also pointed out that the payment which was deposited in the Court was out of the excise duty amounting to Rs. 1 crore. Pursuant to this fact, the efforts for selling out the Padmini cars are not seen from the record even though the lumpsum amount has been refused by these persons, besides some of them have accepted the amount. It is a series of act of giving an offer of lumpsum and accepting by those persons.There is no interventing fact of selling of Padmine Cars or atteast there is no evidence on record showing that only after selling out the Padmine Cars out of the stock, amount was accumulated and the same was disbursed to the employees by way of lumpsum amount. Therefore, the contention of Shri Krishnamurthy also appears to be not will-founded.

57. So far as the land transaction is concerned, I have already discussed about it. The objection of the Collector is on account of the change of user and the matter is still pending before the appropriate Authority and I need not comment anything so far as the varacity of transaction is concerned. However, the amount of Rs. 1 crore was deposited before the Collector, as it was received from the prospective builder. That amount deposited before the Collecter has also not come to the rescue of the Respondents because of the earlier discussion of facts is concerned.

58. Shri Nair who is the Manager-Finance with the Respondents has tried to explain the statements produced before the Court about the accumulated losses and that of the outstanding liabilities, which includes the liability of wages of the Chairman. I have already commented on it and therefore such accumulation of liability has to be seen form the earlier discussion. As stated earlier, the losses caused to the Respondent establishment is reflecting from the record as such, However, the transactions with Fiat India and other aspects is indicative fact of accumulation of funds with the Respondents and the probability of getting the funds, as discussed, has been disclosed by way of having losses only. However, the figures of amount received prior to disbursing the lumpsum amount to the part of the employees is concerned, has not been disclosed minutely. Threfore, though it is not a fit case wherein an adverse inference is to be drawn against the Respondent for suppressing the material facts, but there appears to be a non-disclosure of certain portion of facts, atleast to the extent of sale of cost is concerned. In the result, I have found that though it is advertted strongly about the losses or no business, the point still remains about the non-performance of the agreement, as such.

59. The another strong circumstance reflects from the evidence of The another strong circumstance reflects from the evidence of Shri Nair that the Company has made payments to the employees who were occupying the quarters. They were paid amount for vacating the quarters. Shri Nair has not disclosed the exact figure of amount and also is not aware as to whether any amount has been paid to those employees by the Company. The work of demolition is going on and the debris has been given to the Contractor. Pursuant to this aspect, he process of demolition of structure is going on, which itself shows that the said process may generate funds and the cash-flow can be made available for the Respondents. It is to be noted that the Officers of the Company are being paid their salary, The cheques were issued and encashed within few days. It is pertinent to note that Shri Nair has plainly admitted that within a span of 3 days, the Compay is making arrangement for encashing the same. The source of such arrangement for getting the cheques clearned in lieu of salary of such Officers has not been disclosed. The activites which are going on at Pune do not have any connection with the activities in the automobile industry and therefore I don't intend to give much weightage to that particular aspect.

60. In view of the above contentions and fact-matrix, as scanned by me, it reveals, rather it confirms the earlier observations that there is a sence of suppression of source of income. with all the discussion, I hold that the Respondent has followed unfair labour practice within the meaning of item 9 of Sch. IV of the MRTU and PULP Act, 1971.

61. *Issus No. 2.*—The vital question which has been raised by the Respondent is by challenging the very status of the members of the Association. It is the contention that since they have resigned from the employment, they cannot be covered under the term "employee", as enunciated U/s. 3 (5) of the MRTU and PULP Act, 1971 read with Section 2 (s) of the Industrial Disputes Act, which lays down as follows :—

2 (s) : " workman " means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, elerical or supervisory work forhire or reward, whether the terms of employment be express or implied, and for the purpose of any preceeding under this Act in relation to an industrial dispute, includes any person who has been dismissed, discharged or retrenched in connection which, or as a consequence of, that dispute, or whose dismissal, discharge or refrenchment has led to that dispute, but does not include any such person.

(i) who is subject to the Air Force Act, 1950, or the Army Act, 1950, or the Navy Act, 1957; or

(ii) who is employed in the Police Service or as an Officer or other employes of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity, or

(iv) who, being employed in a supervisory capacity draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the Office or by reason of the powers vested in him, functions mainly of a mangeial nature."

Sub-section (s) of Section 2 does not reflect that the members of the Complainant Association who have resigned from service are excluded. The severance of relations in between the members of the Complainant Association and the Company is on account of the VRS granted. The position of such persons has been explained by our Hon'ble High Court in a case of Ceat Limited (Electronics Division), Mumbai *v/s.* Anand ba Hawaldar and ors. *(2001 III CLR 434),* where in the Hon'ble Lordship has held that —

" Merely because the relationship has been severed on acoount of VRS, it will not itself exclude such employees from the category 3 (5) of the MRTU and PULP Act. "

The eloquent observations need to be reproduced as follows :—

" Mereby by reasons of the relationship of employer-employee has ceased to exist because of the resignation given by the employee, it cannot be said that the employer is absolved from liability arising out of an agreement which had taken place between the employer-employee when employee was in service and the employee has resigned relying on the agreement. It is one thing to say that the cause of action arose only when the employee was in service and it is another thing to say that cause of action arises only after the employee ceased from the employment. In the later case, an employee has a further right to move the Industrial Court for unfair labour practices on account of breach of the terms of the agreement. "

62. The aforesaid observations of the Hon'ble Single Judge have been confirmed by the Hon'ble Division Bench in the aforesaid case, reported in *2003 II CLR 741.* The Hon'ble Division Bench has observed that :—

" Grievance of the Complainant employees was referrable and had nexus with the act complained of, which took place in 1992 when the VRS was accepted and as such they could be said to be workmen and for that limited purpose, the Industrial Court had a jurisdiction."

Considering these observations, it is very clear that the persons involved in the matter have rlied on the assurances of the Respondent Company, They have ected upon, submitted resignation, they were not being paid full amount, they were not paid their pension benefits till the date it was assured and in that case, the Company under a pretext that it holds a liability to pay the pension, but is not performing the same, not making efforts to pay the pension, Therefore, the observations of the Hon'ble Division Bench squarely apply because the employer cannot contend that after resignation these persons cannot be the 'employees' within the meaning of Sec. 2 (s). The Hon'ble Division Banch has referred to the earlier judgment in a csase of P. C. Mayekar *V/s.* Amichand *(1955) 57 Bom. L. R. 1000,* wherein it is held that :—

" Now, the definition of workman does not indicate that the workman must be employed at a particular moment of time. What is emphasised is that he must be employed in any industry to do any skilled or unskilled manual or clerical work for hire or reward; in other words, the definition is intended to point out what is the nature of and characteristic of a person is who can be deemed to be a workman within the meaning of the Act. In our opinion, workman as defined in this sub-section, means any person who is employed at any time in an industry."

In the case of ICI India Ltd. *V/s,* Presiding Officer and Ors. *(1993 I CLR 753)* and further in the same case, reported in *1994 II CLR 494,* the Hon'ble Division Bench has ruled that —

" The expression 'any person' in S-2 (s) must be interpreted liberally so as to include past and present workmen. It is futile to sugest that a dispute about revision of pensionary benefit cannot be raised by the existing workmen and which dispute takes in its sweep the benefit which is available even to a retired employee. "

63. Considering these views it is very clear that the grievance as taken out by the workmen is pertaining to the agreement which they have entered into with the employer during the course of their employment. Their employment came to an end by their resignation in view of the acceptance of VRS. Such aspect need not be construedin away that the employee has voluntarily severed the relations in its entirety because the employee when still is getting the

financial reperoussions of the agreement or in other words, the monetary benefits in lieu of his accepting the scheme, till his superannuation, itself is sufficient to hold that he has a cause to agitate against the employer. Inview of such contentions, I am of the considered opinion that keeping an employee away from the employment and depriving him from the assured monetary benefits and then making him impossible to agitate the said cause in the Industrial Court, itslef is an unfair labour practice on the part of the employer. It is, therefore, very clear that an employee who is keeping himself away from the employment, but is shown on the roll of the Company till the date of superannuation, remains in continuous employment of the Company and as such it has to be construed that he has still a cause of action to agitate against his employer.

64. The Ld. Advocate Shri T. S. Shetty has relied on the case reported in *2001 III CLR 887* (Premier Automobiles Ltd V/s. PAL VRS Employees Welfare Association and anr.) The employees who have opted for VRS had approached Labour Cout u/s. 33-C(2) of the I. D. Act. The Labour Court has granted the relief and the Respondent Company approached the Hon'ble High Court. The employer has prepared a scheme on 8th September 1994. and made applicable to those who were in employment at the relevant date. These employees being not in employment on 8th September 1994 held to be not entitled for seeking the benefits. The crucial point has to reckoned that the Hon'ble Lordship has all the while referred to the word " full and final settlement " and " dues against the Company ." In fact itself, these employees were not at all in the employment in the year 1994. However, when the VRS Scheme was drafted and approved, these employees were in the employment of the Respondent Company and they have accepted it, In between, the employer has stopped giving them the monthly pension. Therefore, though on facts the case differs, the cardinal principles about the severance of relations after receiving the full and final benefits of the scheme has to be reckoned. This particular aspect clearly reiterates that in the instant case, these employees have not at all paid the benefits which were assured and agreed and therefore they have still cause with them to agitate against the employer.

65. Another case relied by Shri T. S. Shetty is of Purandaran V/s. Hindustan Lever Ltd. *(2001 II CLR 170).* The observations therein is —

> " Dismissal, discharge and retrenchment are all voluntary acts on the part of the Management, whereas the case of resignation or voluntary retirement is an act of violation on the part of the workman. The absence of the term "resignation" and retirement in the aforesaid definition, is very conspicuous. When a person claims the status of a ' workman ' under the deeming provision, he has to establish that he comes within the four corners of the definition provided under the statute. "

Construing these observations it is teanspired that the workmen have left the service after receiving all the benefits and therefore the question arose as and when the increased benefits have been claimed by these VRS employees. In that case, their status as a 'workman' has been challenged by the Company. Admittedly the employees are not thrown out forcibly and they have acted voluntarily. However, in view of the observations of the Hon'ble Division Bench of out High Court in case of Ceat Ltd. (supra), they still hold a cause against the employer because the relations still exist in view of the non-performance of agreeement by the employer. Besides, the facts referred, under which the Hon'ble Kerala High Cout has given a rule are of employees claiming the benefits on an another scheme introduced at the latter phase. Therefore, in para 10, Hon'ble His Lordships has observed that —

> " The terms of Service and Schemes applicable to workmen are bound to change with the passage of time. If an employee who left the service based on a particular scheme is allowed to raise such dispute based on new Schemes, that might come into effect during later stages, there will be no end to the claims in such matters and the consequence will be opening of a Pandora's box. "

Such observations if tested with the facts of the instant case, it is clear that there is no new scheme being introduced by the Company, barring the proposal given for the acceptance of lumpsum amount. An lumpsum amount on paper itself was not beneficial to these employees because of the ultimate figure which these employees will be getting by way of pension and by way of lumpsum amount. Therefore, what is required to be seen is the reason for these employees for coming to this Court and the facts that have been narrated is sufficient to hold that they were justified in coming to this Court in the capacity as a wrokmen. As this stage, the Ld. Advocate Shri Shetty has fairly conceeded that the Company is not agitating the status of these persons as workmen on the gound that they were in the managerial or supervisory cadre, but only on the point that since they have resigned from service and hence they are not the workmen. In view of the observations of the Hon'ble Division Bench in Ceat Ltd.'s case (supra) I have formed by conclusion, as above.

66. In case of D. N. Bandopathyay *V/s.* Presiding Officer, 11th Labour Court, Bombay and Ors. (1997 II (CLR 300), the proceeding initiated by the employees was *U/s.* 33-C(2). Resignation was submitted by the employee concerned, after accepting the conditions. Hon'ble his Lordship has held that even in such circumstances, the jurisdiction of Labour Court is not ousted. In a case of Carona Ltd. *V/s.* Sitaram Atmaram Ghag and ors. *(2002 (19) FJR 927)* a point of applicability of Sec. 22 of the sick Industrial Companies (Special Provisions) Act, 1985 was involved, Sec. 22 lays down suspension of legal proceedings, contract, etc. In this case, the Company has not yet been declared sick nor any revival scheme has been given by the Board. Therefore, there cannot be operation of Sec. 22 of the SICA Act in this proceeding. What has been transacted in between is of a transfer of Under-taking and nothing else. Even in that case also, Hon'ble his Lordship has held that a Complaint filed by the employees who have resigned is maintainable.

67. The Hon'ble their Lordships in a case of Delhi Transport Corporation *V/s.* D. T. C. Mazdoor Congress and Ors. *(1991 AIR SC page 101)* have considered the point of difference in between the "voluntary retirement" and "voluntary resignation" and the same has been considered by the Hon'ble Gujarat High Court in a case of Atul Romeshchandra Desai *V/s* Bank of Baroda and anr. *(1997 I CLR 713)* and held that —

> " The consequences of voluntary retirement and resignation would be different and the request of Pensioners of voluntary retirement would not be treated as resignation."

Here in this case, the employees have accepted the scheme and thereby as per the terms of the Scheme have subsequently submitted their resignation. Such resignations cannot be treated as a resignation simplicitor, but it has to be coupled with the earlier acceptance of the scheme, which was introduced by the Management. It is true that the scheme was not compulsory nor the employees were forced to accept it. Therefore, their acceptance of the scheme need not be construed to the fact that they have resigned from service. On the contrary, their action subsequent to that needs to be evaluated because he stills maintain his relation with the Company claiming certain benefits which have remained back from the Company.

68. In a case of Shir Alfin Ernesto Lourence *V/s.* State of Goa and Ors. *(1999 LAB I. C. 1624)*, it was also the plea that the employee who has retired cannot be termed as an "employee" These contentions have beenturned down by Hob'ble their Lordships, pointing out that the benefits of P. F. and other prescribed benefits were remained back as those were available to the employee on his retirement only. Therefore, it is observed that —

> " If the Legislature wanted to exclude the pensioners from the scope of Sec. 13, then there was no reason to make a mention in Sec. 13 to the benefits of pension, gratuity, etc. It appears that the term "employee" used in Sec. 13 is a general term and it also includes retired employees."

Even though these observations are under a different legal forum, the cardinal principle thereunder is that once the employee who has severed his relations by virtue of retirement, can maintain an action against the employer. This question has to be answered that the employee who has not secured the benefits of employment of the tenure of his service can definitely maintain such action to cover the benefits. He cannot be thrown out of the Industrial Court or Labour Court saying that he is now no more concerned with the establishment. This will make his retired life more miserable and is required to face falacies. The recovery of monetary gains for an employer cannot be thrusted on an employee by directing him to approach the Civil Court and pay appropriate stamp duty which cost much, that too when he is not getting the benefits which were assured to him. The contention of the employer, therefore, does not stand on merit that these employees cannot be treated as employee as they have already resigned from the service or have retired from the service with this discussion, I have given my finding to the Point accordingly.

96. *Issue No. 3.*—The Respondent No. 2— Mr. Vinod Doshi is the Chairman of M/s. Premier Automobiles Ltd. and Respondent No. 3 Mr. Maitreya V. Doshi is its Managing Director. It is the contention of the Respondent that these 2 persons are not personally liable for any act and therefore they were not the necessary party to the proceeding of this Complaint. Respondent No. 1 is M/s. Premier Automobiles Ltd. which was the Company where in these persons were employed prior to their opting for VRS Scheme. Pursuant this fact, it has to be borne in mind that the Respondent No. 1 is a Company constituted under the Companies Act and has acquired the status of legal entity. It can sue and it can be sued, However, the exact working of the said legal entity has to be through and by the persons holding the charge of the Assets, manufacturing process, etc. of the Company and such management has to be done by those peresons. Therefore, in that capacity Respondent Nos. 2 and 3 are the persons who were looking after the affairs of the Company and since all the correspondence, policy decisions were being decided, fixed, implemented on behalf of the Respondent No. 1 by Respondent Nos. 2 and 3, it cannot be said that they cannot be made party to the proceeding. They were the necessary parties only to the extent that the Company being run through these authorised persons as notified and authorised under the Companies Act. Pursuant to this fact, it cannot be said that whatever loss caused shall be recouped through these 2 persons or through their personal pockets or personal property. They are the persons who are representing the Respondent No. 1 Company and they cannot be held personally liable for initiating any recovery procedings and the attachment, etc. from their personal properties. I, therefore, hold that the Respondent Nos. 2 and 3 were the necessary parties to the extent of representing the Respondent No. 1 only and not held personally liable for any recovery attachment, etc. from their personal properties.

70. *Issue No. 4.*—With all the above discussion, it is clear that the Respondents have followed the unfair labour practice within the meaning of item 9 of Sch. IV for non-payment of pension to the employees and therefore the Association is entitled for the declaration, as prayed.

71. *Issue No. 5.*—The Consequences of giving a declaration of following the unfair labour practice is nothing but to direct the Respondents to pay the pension. Admittedly, it is fact that by virtue of lumpsum payment, the Respondents have offered to pay. But after going through the entire scheme of VIR, I have found not a whisper on record to show that in case of calamity as occured in this case, the Company can calculate any lumpsum on actuarian basis and to pay the same in lieu of remaining part of pension. It is, therefore, very clear that

these workmen were not knowing that they will be required to face such calamity in future. They have planned their future and retirement life on the basis of the amount they were to get and therefore in the absence of any specific provision in the Scheme, it was an abrupt decision of the Respondent Company to pay the remaining part of the amount in lumpsum. In this regard, it has been vehemently submitted by the Ld. Advocate Shri T. S. Shetty that it is beyond the capacity and control of the Company to pay the amount as it is beyond the financial capacity also.

72. In the case of Kamani Tubes Ltd. *V/s.* Kamani Employees Union and Others (*1987 II CLR page 263),* rule is given as follows :—

> "Item 9 makes the employer's ' failure to implement award, settlement of agreement' an unfair labour practice. When an employer does not implement an award, settlement or agreement, he fails to implement an award, settlement or agreements. There is then a failure on the part of the employer to implement an award, settlement or agreement and he is guilty of the unfair labour practice set out in item 9. The phraseology of item 9 affords no scope for taking into account of motive or reason or cause for the failure. To read item 9 in any manner other than asset out above, would be to do violence to its language. To read item 9 as suggesting that there would be no failure if there was inability to implement would be to read into it the words 'without good cause' and that would be impermissible."

The facts as occured in this case and being narrated before this Court envisages that the loss of business is due to the lock-out and strike, order of the Transport Commissioner, loss of business of Uno Motors, loss of cash-flow, for interference of the Collector, Mumbai in the sales transaction has made the employer impossible to perform his part of contract or implement the award and settlement by paying the pension or arrears of pension. In view of the observations of his Hon'ble Lordship, it is very clear that such defence is not available to the employer. What has been faild to do is failed to do and the said failure cannot be diluted by any means and the declaration has to be given and consequential directions are required to be given.

73. In a recent case of Piramal Spining and Weaving Mills Ltd. Mumbai *V/s.* Rashtriya Mill Mazdoor Sangh, Mumbai (*2001 III CLR 194*), the question of permission of BIFR for intiating the suit for recovery of money was involved and it was held that there is absolutely no substance in it. Though the facts differ, the cardinal principle is that the obligation to pay wages is and will not be affected by virtue of Sec. 22(1) of the SICA Act. Hon'ble Lordship has ruled that—

> " Same principles must apply to retirement benefits, especially in a case such as the present where the employer has assumed a liability to pay retirement benefits so as to obviate a continuing commitment to pay wages. "

In this case also, the employer is accepting the liability to pay the wages and shows willingness to pay the wages, but when is not being explained nor the employer can explain it because the land transaction. has been affected. I don't agree with such defence of land transaction. The question that liability to pay once accepted, then it has to be paid by making a stringent efforts to meet with the requirements. Pursuant to this fact, I hold that the Complainant is entilted for the consequential relief of directions to pay such monthly pension alongwith arrears.

74. Before concluding, it has to be pointed out that the employer has expressly expressed that he has only the resources of money through sale of land at Kurla, Chinchwad and Dombivali. The land transaction at Kurla is affected. Transaction of land at Chinchwad, etc. is ensuing. However, the sale of land seems to be the only apparatus to bring the entire situation under control and to bring end to the dispute. While looking into the prayer clauses, the Complainant has prayed for restriction on the sale transaction. However, such transactions cannot be restricted as there cannot be any outflow of money. Therefore, at the most, the employer can be directed

to deposit the sale amount in the Court forthwith and till then the charge of the outstanding amount has to be kept on the land. The Learned Advocate Shri Mulani has submitted that the Respondents be directed to furnish a Bank Guarantee till the amount has been deposited in the Court. By looking into the existing position of the Respondent No. 1 Company which has transposed its Undertaking alongwith plant, machinery, etc. and having a minus balance in the bank, will not be in a position of furnishing any Bank Guarantee. Instead of that, the charge of the entire amount due if kept on the land at Kurla, itself, then the Respondent can discharge the same by paying the amount on parity basis to these Pensioners.

75. So far as the interest part is concerned admittedly pension has not been paid to the employees since January, 1999. The amount is still outstanding with the Respondents. These Pensioners, therefore, are entitled for the interest on the arrears of pension from 1st January 1999 till the date of this order. The Learned Advocate Shri Mulani has vehemently submitted that the interest should be @ 12% p.a.

76. In a case of State of Kerala and others *V/s.* M. Padmanabhan Nair (*1985 II LLN page 18 S.C.*) the Hon'ble their Lordships of the Supreme Court have clarified the concept of pension and gratuity in the life of the Pensioners and held that—

> " Pension and gratuity are valuable rights and property in the hands of Government Servants and culpable delay in settlement and disbursement must be visited with penalty of payment of interest at the current market rate till actual payment.
>
> It would not be unreasonable to direct the liability to pay penal interest on the dues at the current market rate should commence at the expiry of two months from the date of retirement."

Same are the views expressed in a case of Ex. Capt. R. S. Dhull *V/s.* State of Haryana and others (*1998 (79) FLR 534-SC*) and in the case of S. R. Bhanarale *V/s.* Union of India and Others (*1997 (1) LLN page 147*). The observations of Hon'ble Apex Court are obitar-dicta. Comparing the facts of the cases referred above, a common factor is of delayed payment and grant of interest thereon. While looking into the scheme introduced by the Respondent Company, it will reveal that the amount of pesion has a reference of interest accured by such employee on the amount. Therefore, the amount which is fixed is inclusive of the considerations for the interest. This aspect has to be taken into consideration while fixing the rate of interest. It is very clear that the interest on the arrears of pension has to be imposed.

77. Under the provisions of the M.R.T.U. and P.U.L.P. Act, there is no provision for grant of interest. However, I refer to Sec. 34 of the Code of Civil Procedure, 1908, which is as follows :—

> " 34. Interest—(1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such pricnipal sum for any period prior to the institution of the suit (with further interest at such rate not exceeding six per cent per annuam as the Court deems reasonable on such principal sum), from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit. (Provided that where the liablity in relation to the sum so adjudged had arisen out of a commercial transaction, the rate of such further interest may exceed six per cent per annum, but shall not exceed the contractual rate of interest or where there is no contractual rate, therate at which moneys are lent or advanced by nationalised banks in relation to comercial transaction."

It is, therefore, it is a commercial transaction, then the rate of interest may exceed then 6 percent. The amount so adjudged will therefore have to be paid with interest @ 9% p. a. from

the date 1st January 1999 till the date of paying the entirs arrears. Pursuant to this, I proceed to pass the following Order :—

Order

(*i*) Complaint is allowed.

(*ii*) It is hereby declared that the Respondents have followed unfair labour practice within the the meaning of item 9 of Sch. IV of the MRTU and PULP Act, 1971.

(*iii*) The Respondent are directed to desist permanently from continuing to follow the said unfair labour practice and they are directed to start paying the monthly pension to the members of the Complainant forth with.

(*iv*) The Respondents are further directed to pay the arrears of pension from December 1998 till the date of order alongwith Simple Interest @ 9% p. a. from December, 1998 till the date of order.

(*v*) Till the final payment of dues of the arrears of pension, the charge of the said amount shall remain on the landed propety at Kurla. The Respondents can discharge the said charge by depositing the sale proceeds in the Court immediately after selling the land at Kurla towards arrears of pension with interest and of payment of further monthly instalments of pension to these Ponsioners till the date of their superannuation.

(*vi*) The amount of Rs. 40,34,246.90 deposited in between by the Respondent Company towards the monthly pension is liable to be deducted out of the total amount of be paid towards arrears of pension.

(*vii*) No order as to cost.

P. B. SAWANT,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 11th July 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai,
Dated the 21st July 2003.

IN THE INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

BEFORE SHRI P. K. CHAVARE, PRESIDENT

REVISION APPLICATION (ULP) No. 35 OF 2003.—National Securities Depository Ltd., Trade World, 4th Floor, Kamala Mills Compound, Senapati Bapat Marg, Lower Parel, Mumbai 400 013.—*Applicant—Versus*—Mr. Milind H. Surve, B.D.D. Chawl No. 35, Room No. 78, G. M. Bhosale Marg, Worli, Mumbai 400 018, and 15 ors.—*Opponents.*

CORAM.—Shri P. K. Chavare, President.

Appearances.—Mrs. N. R. Patankar, Advocate for the Applicant.

Shri G. R. Naik, Advocate for the Opponent.

Judgment

1. This is an application under Sec. 44 of the M. R. T. U. and P. U. L. P. Act, 1971 against an order passed on 3rd May 2002 by the Learned Presiding Officer of 11th Labour Court in Complaint (ULP) No. 246 of 2000 and Complaint (ULP) No. 796 of 2000.

2. The Opponent Nos. 1 to 14 had filed Complaint (ULP) No. 246 of 2000 against 3 Respondents including the present Revision Petitioner. It was alleged in the complaint that Shri G. R. Salvi Contractor was brought into by the Revision Petitioner company as fictitious contractor only to dislodge the claim of the said 14 employees from getting their wages per with the other employees engaged by the company. It was specifically alleged in the complaint that Shri Salvi Owner of M/s. Quick Services was brought into the picture only to make a paper arrangement to show that the Complainants were the employees of the said contractor. It was claimed that the Complainants were not being paid minimum wages and other benefits which were paid to the other employees of the Revision Petitioner. It was specifically prayed that an enquiry be made into the unfair labour practice committed by the Respondents and it be declared that they have engaged in and are continuing to engage in unfair labour practice within the meaning of items 1(*a*)(*b*)(*d*) of Schedule-IV of the M.R.T.U. and P.U.L.P. Act, 1971. Alongwith this prayer, the additional prayer was made that pending hearing and final disposal of the main complaint, the Court be pleased to restrain the Respondents from terminating the services of the Complainant Nos. 1 to 14, without following due process of law. The said complaint was registered as Complaint (ULP) No. 246 of 2000.

3. The Opponent No. 15 by raising the identical ground has filed similar Complaint (ULP) No. 796 of 2000.

4. In both these matters, the Revision Petitioner appeared and filed the application marked as Exh. C-1 and claimed that in the light of *Vividh Kamgar Sabha* V/s. *Kalyani Steels Ltd. and Another, 2001-I-CLR-532* unless the relationship of employer employee is established, the complaint would not be tenable. It was specifically claimed that the dispute that the Complainants were the employees of the company must first be got resolved by raising a dispute before the appropriate forum and unless the status of the workmen is established in an appropriate forum no complaint could be filed under the provisions of M.R.T.U. and P.U.L.P. Act, 1971.

5. The Learned Judge of the Labour Court has passed order below Exh. C-1 after hearing both the parties and directed that a preliminary issue be framed in the following words :—

"Do these Respondents prove that there was in existence / non-existence of the relationship of the employer-employee between them with these Complainants at any point of time ?

Being aggrieved by this particular order, the Revision Petitioner has come in revision before this Court. From the submissions advanced at the bar. Following points arise for determination.

Points.—

(1) Did the Lower Court erred in not dismissing the complaint in limit as being not tenable ?

(2) What orders ?

Findings.—

(1) Yes.

(2) As per final order.

Reasons

6. The learned Advocate Mrs. Patankar for the Revision Petitioner submitted that the workmen have claimed that the alleged contractor was a person introduced by the company and the company has claimed that in reality, they were the employees of the contractor. Only proper forum for deciding the issue that the Complainants were the workmen of the company was the Tribunal constituted under the Industrial Dispute Act. Unless such a Tribunal gives a finding that they are the workmen of the company and not the workmen of the contractor, the complaint of unfair labour practice under section 28(*1*) of the M.R.T.U. and P.U.L.P. Act, 1971 would not be maintainable.

7. Shri Naik, Advocate who represents the Opponent submits that he has to take the issue before the Tribunal constituted under the Industrial Disputes Act.

8. I have given anxious consideration to the rival contentions. It appears that even the workmen have filed an application before the Competent Authority for making a reference to the Competent Tribunal. With this, it can safely be said that the status of the workmen is in dispute and unless the said status is determined by the Competent Authority, the complaint under Sec. 28 of the M.R.T.U. and P.U.L.P. Act, 1971 would not lie. The learned Judge of the Lower Court by observing that it was necessary for the Revision Petitioner to place on record the documents relating to the alleged contract and in the absence of such a record, the learned Judge thought it proper to have hearing on the preliminary issue as stated above. When the status of the Complainant was seriously in dispute and when the Complainants themselves have approached the Competent Authority for making a reference for deciding their status, it appears that the learned Judge of the Lower Court was not justified in framing of the preliminary issue and asking the parties to adduce additional material. The material that was already placed on record was more than enough for holding that the status of the workmen was seriously in dispute and unless that status is decided, the complaint under Sec. 28 of the M.R.T.U. and P.U.L.P. Act, 1971 was not maintainable. With this view of the matter, it appears that the order which the learned Judge has passed below Exh. C-1 in both the complaints needs to be interfered with in the revisional jurisdiction of this Court. As a matter of course, the Lower Court ought to have dismissed both the complaints being not maintainable. Hence, the order.

Order

(*i*) The Revision Application is allowed.

(*ii*) The order passed by the Lower Court below Exh. C-1 in the Complaint (ULP) No. 246 of 2000 and Complaint (ULP) No. 796 of 2000 is set aside and instead it is directed the said order will now read as the complaint stands dismissed.

No order as to costs.

P. K. CHAVARE,
President,
Industrial Court, Mumbai.

Mumbai,
Dated the 4th July 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai,
Dated the 5th July 2003.

IN THE INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

REVISION APPLICATION (ULP) No. 136 OF 2001.—IN COMPLAINT (ULP) No. 255 of 2001.—Shri P. B. Bidkar, 5, Sadand Wadi, V. P. Road, Girgaon, Mumbai 400 004.—*Applicant*—*Versus*–(1) Maharashtra State Road Transport Corporation, Kurla, Nehru Nagar Depot, Kurla, Mumbai 400 024. (2) Depot Manager, M.S.R.T. Corporation, Kurla, Nehru Nagar Depot, Kurla, Mumbai 400 024.—*Opponents.*

In the matter of Revision application under Sec. 44 of the M.R.T.U. and P.U.L.P. Act, against the Order dated 30th August 2001 passed by IXth Labour Court, Mumbai, in Complaint (ULP) No. 255 of 2001.

PRESENT.—Shri P. P. Patil, Member.

Industrial Court, Mumbai.

Appearances.—Mrs. Mehraj A. Mulani, Advocate for Applicant.

Shri B. K. Hegade, Advocate for the Respondents.

Judgement Order

(Dated the 16th July 2003)

1. This revision application is directed against the orders dated 27th July 2001 and 30th July 2001 passed in Complaint (ULP) No. 255 of 2001 by IXth Labour Court, Mumbai, who was pleased to reject the interim relief application Exh. U-2 as well as the stay application Exh. U-18 dated 27th July 2001 and 30th July 2001.

2. The facts in brief of this revision are as follows the Petitioner filed complaint against the Respondents under item 1(*b*), (*d*), (*e*), (*f*), and (*g*) of Schedule-IV of the M.R.T.U. and P.U.L.P. Act, 1971 wherein claimed the interim relief by application Exh. U-2 to direct the Respondents not to give effect to show cause notice dated 5th May 2001 or to maintain *status quo* in respect of employment of the Petitioner. The Petitioner was served with the chargesheet on 25th September 2000 which was replied by him on 1st October 2000 denying the allegations. The charges put on the Petitioner are indiscipline, loss caused to the Respondent Corporation, absenteeism, irregularity in attending duties as per the chargesheet dated 25th September 2000. After having been given opportunity to the Petitioner to reply the chargesheet, the Respondents initiated enquiry. Show cause notice was served upon the Petitioner calling upon him to submit his explanation, who replied the show cause notice by his letter dated 6th May 2001.

3. The Respondent Corporation gave direction to the subordinate staff to remove files from the table of the Petitioner because of his continuous absence. The Petitioner informed that the Depot Manager of not giving files therefore take search. The Petitioner has taken search but he could not trace out the concerned files. The petition could not attend duty because of his continuous illness, who was admitted in the hospital. In absence of the Petitioner, he removed files from his table. The charges levelled against the Petitioner were denied totally by the Petitioner and according to him, the findings of the enquiry officer are perverse. The Petitioner claimed before the Labour Court to stay the proposed action of the Respondents dismissing him from service by not giving effect to the show cause notice dated 5th May 2001 or maintain *status quo* till pending decision of the complaint.

4. The Respondent Corporation strongly opposed the interim relief application on the grounds that the serious misconduct is committed by the Petitioner and after having been proved the misconduct during the enquiry, show cause notice was served upon the Petitioner proposing punishment of dismissal from service. It is contended by the Respondents that several defaults and serious misconducts of grave nature were committed from time to time by the Petitioner, therefore, he was served with the chargesheet and after obtaining explanation to the charges, initiated domestic enquiry against him. The nature of misconducts committed by the Petitioner are explained in the say, which are proved in the enquiry, therefore, explanation was asked from the Petitioner for the proposed action to be taken against him for his dismissal from service. Lastly, it is contended by the Respondents that there is no balance of convenience lies in favour of the Petitioner, therefore, not entitled for interim relief as claimed.

5. Having heard the parties to the complaint, the learned Labour Judge was pleased to reject the interim relief application Exh. U-2 as well as the stay application Exh. U-18 on 27th July 2001 and 30th July 2001 respectively which are the impugned orders in the present revision.

6. Heard the learned Advocates for the Petitioner and the Respondents.

7. The following points arise for my determination :—

Points.—

(1) Whether the Petitioner has proved the perversity, illegality or arbitrating in the impugned orders dated 27th July 2001 and 30th July 2001, therefore, the said orders are liable to be quashed and set aside ?

(2) What orders ?

Findings.—

(1) No,

(2) Revision is dismissed.

Reasons

8. In view of the provisions laid down in Sec. 30(*2*) of the M.R.T.U. and P.U.L.P. Act, the Court is empowered to pass interim orders as deem just and proper. Taking help of the said provisions, the Petitioner is claiming interim relief by an application Exh. U-2 to do direct the Respondents not to give effect to the show cause notice dated 5th May 2001 or to maintain *status quo* in respect of his employment till pending decision of the complaint. While dealing with the interim relief application, three points are necessary to be considered. Firstly, whether the party claiming such interim relief has made out a *prima facie* case, secondly in whose favour the balance of convenience lies and lastly which party is likely to cause irreparable loss. It is pertinent to note that the revisional Court is conferred with the power under Sec. 44 of the M.R.T.U. and P.U.L.P. Act to examine the legality and propriety of the impugned order. But the limited powers are conferred on the revisional Courts by the provisions of Sec. 44 of the M.R.T.U. and P.U.L.P. Act, therefore, expected not to travel beyond the scope of the statutory provisions. The interim reliefs either considered or rejected by the trial Courts being purely discretionary relief, the revisional Courts must be cautious while interfering with such relief.

9. As per the chargesheet dated 25th September 2000 several charges are put on the Petitioner, some are of serious nature. According to the Respondent Corporation, the domestic enquiry was initiated for proving the charges, and after affording reasonable opportunity to the Petitioner found that the misconducts committed by him are proved with sufficient material evidence, therefore, show cause notice was served upon the Petitioner as to why the punishment of dismissal from service should not be imposed. Whether the enquiry was fair or proper or based on the principles of natural justice is a separate issue. But, it is clear that the Respondent had come to conclusion to impose proposed punishment after proving the misconduct in the enquiry. Therefore, it would be a task to decide the issue of fairness of enquiry of perversity in the findings of the enquiry officer. Here the question is for consideration of the interim relief seeking prohibition for effecting the proposed punishment as per the show cause notice served upon the Petitioner or atleast maintain *status quo* till pending the decision of the complaint.

10. The learned Advocate for the Respondents has pointed out that the interim relief and final relief in the complaint claimed are just identical, therefore, the interim relief cannot be granted in the nature of final relief. The learned Advocate for the Respondents has further pointed out the fact of dismissal of the Petitioner from service already been effected, therefore, the question of staying the process of show cause notice or granting *status quo* is meaningless. After having given a close look to the impugned order dated 27th July 2001 it will be very much clear that the learned Labour Judge unnecessarily taken pain in discussing the process of enquiry in detail at the interim stage, which would be the main point for determination at the

time of deciding the complaint on merits. While dealing with the interim relief application, the concerned party has made out a *prima facie* case or not that is to be seen without going into the merits of the matter. The learned Advocate for the Petitioner has placed reliance on several case laws mentioned in the written notes of his arguments. He has placed reliance on the case of Sadanand Ramesh Samsi *V/s.* Kirloskar Cummins Ltd. and others reported in *2002 (4) MLJ 804 Bombay,* wherein it is held :—

" Supervisory jurisdiction of Industrial Court— It can consider evidence which is not considered by the Labour Court. "

The submission of the learned Advocate is that this Court can consider the evidence available on record not considered by the Labour Court under supervisory jurisdiction. I am in agreement with the submission of the learned Advocate for the Petitioner. But, there cannot be reappreciation of evidence in the revision filed under Sec. 44 of the M.R.T.U. and P.U.L.P. Act. The reliance is also placed by the learned Advocate for the Petitioner on the case of Electronics Corporation of India *V/s.* G. Murlidhar reported in *2001 II CLR 29 SC,* wherein it is held that :—

" There is no general provision conferring power of review or revision to the Board against an order by Appellate authority, that as such valuable right of appeal is denied to the Respondent and that as such order of termination got vitiated."

In view of the ratio laid down in the above cited case, the learned Advocate for the Petitioner has given more emphasis on the powers conferred on the revisional Court. According to the learned Advocate for the Petitioner, even in the case of dismissal of an employee after due enquiry, Industrial Tribunal can exercise the powers U/s. 11-A of the Industrial Dispute Act, 1947, and in support of his contention has placed reliance on the case of Bombay Telephone Canteen Employees' Association and another *V/s.* Manager, Mahanagar Telephone Nigam Limited and another reported in *2003 I LLN 100 Bombay* wherein it is held that :—

"Industrial Disputes Act, 1947, Sections 10(*1*) and 11-A-Powers under Sec. 11-A-Reappraisal of evidence-Dismissal of an employee after due enquiry upheld by industrial Tribunal-Held, Tribunal ought to have exercised its powers under Sec. 11-A which are wide enough and discretionery and enable it to appreciate evidence of enquiry officer-Confirming findings without examining evidence is not proper-Matter remanded back for fresh consideration to determine proportionality of punishment."

On the case of Gokul Prasad Mishra *V/s.* The Upper Mukhya Adhikari, Zilla Parishad Lalitpur and others reported in *2002 Lab I. C. 2907* Allahabad, in which placed reliance by the learned Advocate for the Petitioner, wherein it is held that :—

"U. P. Kshetra Samitis and Zilla Parishads Adhiniyam (33 of 1961) Sec. 237-U. P. Zilla Parishad Services Rules (1970), Rule 36, 37, Disciplinary proceedings-Imposition of major punishment of dismissal from service-Procedure prescribed under Rule 36, 37 not observed-Enquiry also not made in consonance to normal procedure-Enquiry report, its findings as well as decision of dismissal, liable to be set aside-Delinquent reinstated-However, considering the fact that he had not rendered any service, only 50% backwages were paid to him."

The ratio laid down in the above cited case is not applicable because finally the matter was concluded and held the major punishment of dismissal imposed without following the procedure prescribed for enquiry.

11. The learned Advocate for the Petitioner is also taking help of the ratio laid down in the case of Surjit Ghosh *V/s.* Chairman and Managing Director, United Commercial Bank and others reported in *1995 I CLR 390 SC,* wherein it is held that :—

"United Commercial Bank Officers (Discipline and Appeals) Regulations, 1976-Regulation 8(*2*)(iii) read with Regulation 3(g)-Right of appeal against order of disciplinary authority and review against the order of appellate authority-Depriving delinquent of said right-In instant case, appellate authority exercised the power of disciplinary authority-It is held that the Appellant (delinquent) was deprived of the right of appeal and review as the appellate authority exercised the power of disciplinary authority and that as such the order of dismissal suffers from inherent defect and was liable to be set aside."

During the course of arguments, the learned Advocate for the Petitioner has tried to convince the Court that as per the provisions of Sec. 30(*2*) of the M.R.T.U. and P.U.L.P. Act, this Court can review the order passed by the Labour Court and to substantial his argument placed reliance on the case of Association of Engineering Workers *V/s.* A. T. V. Limited, Mumbai and Another reported in *2002 II CLR 387* Bombay, wherein it is held that —

"Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971-Sec. 30(*2*)-Power of Review of final order-Petitioner Association filed complaint of unfair labour practices of resorting to illegal lock out etc.-Complaint was allowed-Respondent filed review application-Industrial Court allowed review application and dismissed complaint. Hence the petition contending that review was not maintainable against final order-Held the Industrial Court was right in holding that the review application was maintainable when it came across certain facts, which in view were necessary for judicial adjudication and absence of consideration thereof would amount to miscarriage of justice."

The case laws cited by the learned Advocate for the Petitioner are the cases, which were finally decided. But we are at the interim stage for consideration of the interim reliefs and particularly any error on the face of it finding place in the orders passed by the learned Labour Judge. The learned Labour Judge also discussed several case laws and after having been considered come to conclusion it is not the case to grant interim relief in favour of the Petitioner as he failed to make strong *prima facie* case as well as no balance of convenies lies in his favour, therefore, the interim relief application came to be rejected by order dated 27th July 2001 as well as the learned Labour Judge declined to stay its order dated 27th July 2001, as claimed by the Petitioner *vide* application Exh. U-18 and to that effect the order is passed on the said application on 30th July 2001.

12. The learned Advocate for the Respondents tried to demonstrate as to how the Industrial Tribunal has limited jurisdiction as per the provisions of Sec. 44 of the M.R.T.U. and P.U.L.P. Act, having no right to re-appreciate the evidence on record and to give a different findings. He has placed reliance on the case of R. A. Yadav *V/s.* Special Steels Limited and another, reported in *2003 I CLR 443 Bombay,* wherein it is held that —

" In the facts and circumstances of the case, Industrial Court ought not to have reappreciated the evidence on record and given a different finding when a clear detailed finding was given by Labour Court which is based on evidence and which cannot be said to be perverse and Industrial Court ought not to have exercised its jurisdiction under Sec. 44 of the M.R.T.U. and P.U.L.P. Act of 1971 and interfered with the same."

13. The learned Labour Judge after having been considered the material on record declined to grant interim relief as there is no strong *prima facie* case established by the Petitioner, therefore, no reason to interfere with the right of the employer (Respondent) to enforce the punishment punishable under the statutory rules. The learned Labour Judge has discussed in detail the serious charges levelled against the Petitioner for which the enquiry was initiated and after proving it, the Respondents dismissed the Petitioner from service. In this back ground, the learned Labour Judge has rightly refused to grant the interim reliefs. Therefore, both the orders dated 27th July 2001 and 30th July 2001 do not call for any interference. In the result, the present revision application deserves to be dismissed as per the order passed below :—

Order

Revision Application (ULP) No. 136 of 2001 is hereby dismissed, with no order as to costs.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 16th July 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.
Dated the 22nd July 2003.

IN THE INDUSTRIAL COURT, MAHARASHTRA AT MUMBAI

COMPLAINT (ULP) No. 1602 OF 1998.—The General Secretary, The BEST Workers Union, 62, Kennedy Bridge, Mumbai 400 004.—*Complainant—Versus*—(1) The General Manager, The BEST Undertaking, BEST House, Mumbai 400 001, (2) Smt. A. S. Prabhune, Establishment Officer (Supply), BEST Undertaking, Mumbai 400 001.—*Respondents.*

In the matter of complaint of unfair labour practices under item 3 of Sch.-IV of the M.R.T.U. and P.U.L.P. Act, 1971.

Present.—Shri P. P. Patil, Member, Industrial Court, Mumbai.

Appearances.—Mr. S. A. Khamkar for the Complainant Union.

Mr. R. G. Hegde, Advocate for the Respondents.

Judgement And Order

(Dated the 15th July 2003)

1. This complaint is under item 3 of Sch.-IV of the M.R.T.U. and P.U.L.P. Act, 1971 (hereinafter referred to as the said Act). The Complainant union is claiming that the Respondents are engaging unfair labour practices covered under item 9 of Sch. IV of the said Act by transferring an employee Shri L. G. Yadav from Commercial (South), Colaba, to the Street Lighting Dept. at Kussara.

2. The facts in brief of the complaint are as under :—

The Complainant is the General Secretary of the BEST Workers Union, which is a representative and approved union. The Respondent No. 2 Smt. A. S. Prabhune is working as the Establishment Officer in the Supply Division of the Respondent No. 1–Undertaking. The employee L. G. Yadav is working as Supervisor in Commercial (South) Department at Colaba, who is a member of the Managing Committee and Secretary of the Complainant union. The employee Yadav had taken part in dharana held on 6th, 7th and 8th October 1988 alongwith the Complainant union for various demands, therefore, the said Yadav has been transferred from Colaba to Street Lighting Department under the guise of the management policy with *malafide* intention. The transfer of the employee Yadav made by way of victimization and with an intention to penalise him for his union activities. Transferring employee Yadav by order dated 4th December 1998 amounts to unfair labour practice covered under item 3 of Sch. IV of the said Act. Hence this complaint.

3. The Respondents have filed their written statement at Exh. C-4 and strongly resisted the claim of the Complainant union to stay the transfer order dated 4th December 1998. It is denied by the Respondents that the allegations of transfer of employee Yadav *malafide* or by way of victimization within intention to penalise him because of taken pat in dharana or being a member of the managing Committee of the Complainant union. It is contended by the Respondents that previously the said employee Yadav was transferred in the year 1997 being a seniormost employee working in the Commercial Department (South) by order dated 21st March 1997. But, he made a request to keep in abeyance the said transfer order for some time and his request was considered. According to the Respondents, the transfer of the employee Shri Yadav is a routine course and it is an incidence of service. It is denied by the Respondents that the transfer of employee Yadav is made *malafide* in colourable exercise of the employer's policy.

4. My learned Predecessor was pleased to frame the issues on 20th September 2001 at Exh. O-2, which are reproduced below :—

Issues.— (1) Does the Complainant prove that the transfer of Shri L. G. Yadav from Colaba Depot to Street Lighting Department, Kussara is *malafide* ? (2) Whether the Respondent have committed unfair labour practice under item 3 of Sch. IV of the M.R.T.U. and P.U.L.P. Act, 1971 ? (3) Whether the Complainant union is entitled to any relief/reliefs ? (4) What order ?

Findings.— *(1)* No. (2) No. (3) No. (4) Complaint is dismissed.

Reasons

5. An employee may challenge his transfer if it tribute with *malafide* intention by way of victimization or it is colourable exercise of the employer's power. The transfer order dated 4th December 1998 is challenged by the Complainant union on two grounds, firstly an employee Yadav being the member of the managing committee of the Complainant union and secondly he had taken part in the agitation held on 6th, 7th and 8th October 1989. It is not disputed by the Respondent the status of the employee Yadav as member of the managing committee of the Complainant union, but denied the allegation because of the said employee being a member of the managing committee of the Complainant union, such action was taken. According to the Respondents, the transfer is an incidence of service and the employee Yadav being seniormost in the Commercial Dept. (South), his transfer is made in routine course.

6. The Complainant examined Mr. Andrade, the President of the Complainant union who made a statement on oath about *malafide* transfer of employee Yadav because he had participated in dharana. In the cross examination, the witness Andrade has admitted that majority of the office bearers of the union and participated in dharana. Further, the said witness has admitted that by the transfer order dated 4th December 1998, 12 employees were transferred and except Mr. Yadav, none of those employees are the office bearers of the Complainant union. The witness Andrade has admitted that Shri Yadav was working at Colaba office since 1990. The distance between Colaba office and Kussara Depot. admitted by the witness may be more than 5 kilo meters, but less 10 kilo meters. In view of the admission given by the witness Andrade, the learned Advocate for the Respondents has submitted that the transfer of Shri Yadav is a general transfer alongwith other employees, because he was seniormost at Colaba Office, therefore, due for transfer and the transfer being the incidence of service, the said employee through the union is not entitled to challenge the action of the Respondents. The learned Advocate for the Respondents has pointed out that the office at Kussara Depot is situated at a distance of less than 10 kilo meters from Colaba Depot. therefore, there is no possibility of hampering the Complainant union activities because of the transfer of Mr. Yadav.

7. The Respondents have examines Mr. Darne, the Senior Personnel Officer who made a statement on oath about the policy of transfers of employees and according to him the employees working the sensitive department are liable for transfer after three years and the employees working in the non-sensitive department are due for transfer after five years. The witness Mr. Darne has further stated that the Commercial Department (South) comes under the category of the sensitive department. The transfer order dated 21st March 1997 is place on record by which the present employee Mr. Yadav was transferred from the Commercial Department (South) to Energy Audit department, but on his request the said transfer was stayed by the Respondents. As per the letter dated 11th January 1999 Exh. C-8 the employee Yadav has resumed the his duty at the transferred place on 22nd September 1998. The witness Darne has

stated that presently employee Yadav is working in the Material Management department at Colaba on account of his transfer from Street Lighting department. It means an employee Yadav who was transferred to Street Lighting department, Kussara again, he has been transferred to Material Management department at Colaba. The learned Advocate for the Respondents has submitted that the complaint itself becomes infrctuous, as no cause of action survive because of subsequent transfer of Yadav from Street Lighting department, Kussara to the Material Management department, at Colaba.

8. The learned representaitve for the Complainant union has submitted that only because of Mr. Yadav took part in the union activities for being a member of the managing committee of the Complainant union who had taken part in dharna transferred him deliberately and *malafide*. He placed reliance on the decision in the case of Maharashtra General Kamgar Union *V/s.* Handloom Fabrics Marketing Co-operative Society Limited and another, reported in *1991 II CLR 293 Bombay*, wherein it is held that —

> "Lack of legality to an act of transfer amounts to legal *malafides* and that would be covered by item 3 of Sch. IV of the Act."
> and on this short ground, the petition was entitled to the relief claimed.

But the facts of the present case are not identical with the above case cited by the Complainant union. In the instant case, there is no lack of legality to an act of transfer or omission. Their transfer of an employee Yadav is a general and routine transfer alongwith the other workmen being seniormost employees working since 1990 in Commercial Dept. (South) at Colaba. The Complainant union has miserably failed to prove that the transfer of employee Yadav is either by way of victimization or *malafide*. Therefore, I find no substance in the complaint, which deserves to be dismissed as per the order passed below :—

Order

Complaint (ULP) No. 1602 of 1998 is hereby dismissed with no order as to costs.

P. P. PATIL,
Member,
Industrial Court, Mumbai.

Mumbai,
Dated the 15th July 2003.

K. G. SATHE,
Registrar,
Industrial Court, Mumbai.
Dated the 21st July 2003.

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